Petition

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No. 81-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL CORPORATION
and
MOBIL OIL CORPORATION,
Petitioners

—against—

MARATHON OIL COMPANY,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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December 29, 1981

QUESTION PRESENTED

Whether a federal district court that has preliminarily enjoined one of two competing tender offerors from proceeding with its offer on antitrust grounds may thereafter refuse to consider a divestiture plan that would avoid the alleged antitrust violations upon which the injunction was premised?

THE PARTIES

Petitioners Mobil Corporation and Mobil Oil Corporation (hereinafter collectively and individually "Mobil") were defendants in the district court and appellants in the court of appeals.

Respondent Marathon Oil Company ("Marathon") was the plaintiff in the district court and appellee in the court of appeals.

United States Steel Corporation ("Steel") was not a party below. However, Mobil is making an emergency application to this Court to have Steel added as a party before this Court.

TABLE OF CONTENTS

	Page
OPINIONS BELOW	1
JURISDICTION	1
STATUTORY PROVISION INVOLVED	2
PRELIMINARY STATEMENT	2
STATEMENT OF THE CASE	4
REASONS FOR GRANTING THE WRIT	7
1. The Decision Below Presents An Important Issue Concerning Judicial Administration Of Private Antitrust Litigation Designed To Frustrate Major Tender Offers	7
2. The Failure To Give Mobil A Hearing On Its Proposed Curative Divestiture Is Contrary To This Court's Controlling Decisions And Creates A Conflict Among The Circuits	10
CONCLUSION	12
Appendices	
Opinion and Judgment of the Court of Appeals	A-1
Memorandum of Opinion and Order of the District Court, November 30, 1981	A-11
Transcript of Proceedings in the District Court, December 1, 1981	A-29
Memorandum of Opinion and Order of the District Court, December 9, 1981	A-39
Opinion and Judgment of the Court of Appeals in *Mobil Corporation* v. *Marathon Oil Company, et al.*, December 23, 1981	A-42
Listing of Subsidiaries and Affiliates of Petitioners Pursuant to Supreme Court Rule 28.1	A-65

TABLE OF AUTHORITIES

Cases

	Page
Brown Shoe Co. v. *United States*, 370 U.S. 294 (1962)	8
Filtrol Corp. v. *Slick Corp.*, [1970] Trade Cas. (CCH) ¶ 73,035 (C.D. Cal. 1969), *aff'd per curiam*, 425 F.2d 826 (9th Cir. 1970)	8
First National Bank of Salem, Ohio v. *Hirsch*, 535 F.2d 343 (6th Cir. 1976)	6
General Aircraft Corp. v. *Lampert*, 556 F.2d 90 (1st Cir. 1977)	11
Hamilton Watch Co. v. *Benrus Watch Co.*, 206 F.2d 738 (2nd Cir. 1953)	11
Life Investors, Inc. v. *AGO Holding, N.V.*, [1981] Fed. Sec. L. Rep. (CCH) ¶ 98,356 (8th Cir. 1981)	11
Prudent Real Estate Trust v. *Johncamp Realty, Inc.*, 599 F.2d 1140 (2nd Cir. 1979)	11
System Federation v. *Wright*, 364 U.S. 642 (1961)	11
United States v. *Atlantic Richfield Co.*, 297 F. Supp. 1001 (S.D.N.Y. 1969), *aff'd sub nom. Bartlett* v. *United States*, 401 U.S. 986 (1971)	8
United States v. *Swift & Co.*, 286 U.S. 106 (1932)	8, 10

Statutes

15 U.S.C. § 18 (1973 & Supp. 1981)	2, 4
28 U.S.C. § 1254(1) (1966)	2
28 U.S.C. § 1337(a)	4

Miscellaneous

ABA Antitrust Section, Monograph No. 1, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act, Policy and Law* (1977)	9
Easterbrook & Fischel, *The Proper Role of a Target's Management in Responding to a Tender Offer*, 94 Harv. L. Rev. 1161 (1981)	10
Wall Street J., Dec. 9, 1981, at 5, col.1	8
Wall Street J., May 26, 1972, at 14, col.2	8
Wall Street J.,Nov. 17, 1971, at 17, col.1	8
11 C. WRIGHT AND A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL, § 2961 at 600 (1973)	11

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October Term, 1981

MOBIL CORPORATION

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Petitioners

-against-

MARATHON OIL COMPANY,

Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The opinion of the court of appeals, rendered on December 23, 1981 and not yet reported, is reproduced in the Appendix at A-1.[1] A Memorandum of Opinion and Order of the District Court for the Northern District of Ohio dated November 30, 1981 is reproduced in the Appendix at A-11, a transcript of an oral ruling of that court dated December 1, 1981 is reproduced in the Appendix at A-29, and a Memorandum of Opinion of the district court dated December 9, 1981 is reproduced in the Appendix at A-39.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was set forth in its opinion entered on December 23, 1981. (A-1)

1. Page references to the Appendix to this Petition are cited as "A- ."

This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1)(1966).

STATUTORY PROVISION INVOLVED

Section 7 of the Clayton Act, 15 U.S.C. § 18 (1973 & Supp. 1981) provides in pertinent part:

> § 18. Acquistion by one corporation of stock of another.
>
> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly. . . .

PRELIMINARY STATEMENT

This petition presents a question of general importance both in the law governing competitive tender offers and in the law governing preliminary injunctions. Moreover, the decision below places the Sixth Circuit's law in direct conflict with prior decisions of this Court and the law of other circuits.

Because tender contests are usually brief, lower court rulings on preliminary injunctions generally determine the outcome and the law thus made escapes review by this Court. The subject of tender offers—affecting as it does both economic efficiency and fairness to shareholders—is too important to be governed in so ad hoc a fashion.

It is common knowledge that a corporate management, faced with a tender offer that may endanger the incumbents' job security, often responds with a lightning antitrust suit designed to delay the offeror long enough to negotiate a sale to a company

that will not replace management. As in this case, the financial benefit of the acquired company's shareholders of competing bids is often subordinated to the personal ambitions of management.

The success of this tactic damages the integrity of the law, unless the antitrust action is well-founded. Here it is not. The district court granted a preliminary injunction on the ground that Mobil's acquisition of Marathon might harm competition in motor gasoline sales in six individual midwestern states. In less than twenty-four hours Mobil offered to divest the assets identified as creating the problem. In a week, Mobil placed before the court a contract for the sale of Marathon's United States marketing, refining and transportation assets to a substantial independent oil company that did not market gasoline in the areas identified by the court and has a history of selling to independents. Because the antitrust problem was thereby solved, Mobil asked that a hearing be held and the preliminary injunction lifted. The district court on both occasions refused to alter its order, refused to grant a hearing, and declined to give any reason for its actions. The court of appeals summarily affirmed.

These extraordinary rulings mean that a party cannot have a preliminary injunction lifted even if it modifies the transaction to comply with the trial court's view of the law and thus removes the basis for the injunction. The practical effect is, in this case, that Steel will acquire control of Marathon unopposed because shareholders are denied the option of accepting Mobil's higher offer. More generally, the Sixth Circuit's new rule means that district courts will frequently have unfettered discretion to determine the winner of tender contests and that, in all types of cases, injunctions may remain in effect after the reason for them has been eliminated.

These are important matters both in law and in practical terms. This Court is asked to resolve the conflict in law and give badly needed guidance to lower courts for the future.

STATEMENT OF THE CASE

Mobil announced a tender offer for shares of Marathon on October 30, 1981 and was sued by Marathon two days later for alleged violations of section 7 of the Clayton Act, 15 U.S.C. § 18 (1973 & Supp. 1981)[2]. On the day it filed suit, Marathon secured an *ex parte* temporary restraining order and moved for a preliminary injunction enjoining, *inter alia*, Mobil's purchase of Marathon shares.

On November 19, after expedited discovery and in the midst of a four day evidentiary hearing on Marathon's preliminary injunction motion, Marathon management anounced that it had found a "white knight," Steel, to tender for Marathon shares in competition with Mobil. Steel stated that its present intention was to retain Marathon management, and Marathon management favored Steel with two options, allegedly granted at Steel's behest, which were designed, in the words of the Court of Appeals for the Sixth Circuit, to "lock up" the bidding contest against any competing offeror without regard to the price that Marathon shareholders might receive for their shares.

With the bidding contest thus skewed, Marathon proceeded to litigate its antitrust case against Mobil, focusing on the alleged impact on competition in the wholesale marketing of gasoline in various cities and states.

On November 30, the district court issued a "Memorandum of Opinion and Order" (A-11) preliminarily enjoining Mobil's purchase of Marathon's shares. The district court's decision found a reasonable probability that, after a full trial, Marathon would be able to establish a violation of section 7 of the Clayton Act in the marketing of motor gasoline in six individual midwestern states. (A-28) Although Mobil believed that decision was wrong, in view of the time constraints introduced by Steel's competing offer, Mobil both appealed and sought to find a purchaser

2. Marathon's antitrust case was filed in the United States District Court for the Northern District of Ohio (Eastern Division). Jurisdiction was premised on 28 U.S.C. § 1337(a).

for Marathon's marketing assets which did not market gasoline in the midwest and had a strong history of selling gasoline to independents.

On December 1 in chambers the district judge issued an "Order" preliminarily enjoining Mobil from purchasing Marathon shares. At the same conference, Mobil moved for an order modifying the preliminary injunction to enable Mobil to purchase Marathon shares on the condition that Mobil would hold separate all of Marathon's refining and marketing assets and would present within sixty days following Mobil's acquisition of all outstanding Marathon shares a plan of divestiture of those assets. (A-30, A-37) A written order embodying Mobil's proposed modification was presented to the district judge at the conference. (A-36) The judge rejected the proposed order without giving any reasons or making any findings. (A-37) Mobil promptly appealed the preliminary injunction and the district court's refusal to modify the injunction to permit a divestiture of the offending assets.

On December 6 Mobil executed a contract with Amerada Hess Corporation ("Hess") that required Mobil to transfer to Hess all of Marathon's United States marketing, refining and transportation assets if Mobil succeeded in gaining control of Marathon. The contract, which set forth the price and various other terms concerning the transfer, was designed specifically to meet and remove the antitrust concerns expressed by the district court.

Because the Hess contract dramatically changed Mobil's situation, removing the antitrust problems litigated at the preliminary injunction hearing, Mobil moved on December 7 in the court of appeals for "leave to proceed in the district court" to show, in light of its agreement with Hess, that each of the antitrust objections raised by Marathon to Mobil's tender either no longer pertained or did not justify a preliminary injunction.[3] On December 8

3. During the proceedings below, the Federal Trade Commission had been conducting an intensive review of information relating to the acquisition of Marathon by Mobil provided pursuant to the merger notification provisions of the Hart-Scott-Rodino Act. On December 11, 1981, the FTC indicated that, if the Commission were satisfied with

Mobil filed in the district court an "Application to Modify" the court's preliminary injunction and appended to its application a copy of the Mobil-Hess contract. In its Application to Modify Mobil pointed out not only that the Hess contract eliminated any antitrust problem Mobil would otherwise have if it owned Marathon's marketing and refining assets, but also that Hess' ownership of those assets would not create other antitrust problems. For example, Hess does not market gasoline in the midwest and is an active supplier to independent rebranders. At the same time, pursuant to the law of the Sixth Circuit, *First National Bank of Salem, Ohio* v. *Hirsch*, 535 F.2d 343 (6th Cir. 1976), Mobil asked the district court for a certificate stating its willingness to hold appropriate hearings to consider modifying the preliminary injunction in light of the Hess contract. The district court, however, flatly denied Mobil's application holding that,

> [Mobil's] proposal made on December 1, 1981 and the current proposal do not, on the basis of Mobil's oral presentation on December 1, 1981 and its present written motion, vary in degree sufficient to impose upon this court the need to reexamine a matter of which it has already once disposed. (A-40)

As a result of that decision, which effectively meant that Marathon would be owned by Steel unless appellate review was secured promptly, Mobil pressed its claim to consider the Hess contract in the court of appeals. But, on December 23, 1981 the court of

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a curative divestiture plan covering Marathon's marketing and transportation assets, it would not seek to enjoin Mobil's tender offer. The Commission filed a Complaint against Mobil in the United States District Court for the Northern District of Ohio that sought to preliminarily enjoin Mobil's tender offer only

> . . . unless and until such time as there is presented a transaction, subject to the approval of the Court, which would result in an immediate divestiture of the transportation, storage, and marketing assets of Marathon, in such a manner as to maintain the divested entity in viable competition in the relevant markets, and which divestiture would not itself violate any of the antitrust laws of the United States.

appeals affirmed the district court's decision regarding the preliminary injunction, virtually ignoring the key question of the change of circumstances resulting from the Hess contract. The court referred to the curative divestiture in a single sentence:

> We also conclude that the District Court did not abuse its discretion in rejecting Mobil's proposed "hold separate order" which was orally advanced after the preliminary injunction was granted. (A-9)

REASONS FOR GRANTING THE WRIT

1. The Decision Below Presents An Important Issue Concerning Judicial Administration Of Private Antitrust Litigation Designed To Frustrate Major Tender Offers.

The consequence of the decisions below is that the entire tender contest and the rights of the stockholders are chisled in concrete at the stage of a preliminary injunction motion. Practical business solutions to alleged antitrust problems were ignored by the lower courts as though the law were not concerned with solutions, only with problems. That is bad law and bad policy.

In this case Mobil defended against Marathon's private antitrust suit in the good faith belief and on the advice of independent counsel that Mobil's tender offer, if successful, would not violate the Clayton Act.[4] When the district court found a "reasonable probability" that the merger would violate the Act in the marketing of gasoline in six individual states, Mobil promptly acted to assure a divestment of all Marathon marketing, refining and transportation assets. Despite this, the lower courts refused to consider the impact of the divestiture on the need for any injunction. In so doing, the courts effectively precluded Mobil from remedying the alleged wrong. The unfairness is manifest. Mobil's tender offer, which has a total value to the shareholders in

4. Mobil still believes that, even without the Hess contract, its acquisition of Marathon would not violate the antitrust laws. Because Mobil has signed a contract to dispose of the allegedly offending Marathon assets, this question—and virtually all of the court of appeals decision based on discredited economic theories, misapprehension of the record and outdated antitrust precedents—is irrelevant and serves only to entrench Marathon's management.

excess of Steel's offer, is now enjoined based upon circumstances that no longer apply. Moreover, it is being denied the elementary right to be heard in a court to prove that there is no present justification for the restraint against it.

There is no sound policy supporting the actions below. Courts of equity have never been and should not be blind to changing circumstances that affect their decrees. *E.g., United States* v. *Swift & Co.*, 286 U.S. 106 (1932); *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd sub nom. Bartlett* v. *United States*, 401 U.S. 986 (1971).[5] *See also Brown Shoe Co.* v. *United States*, 370 U.S. 294, 337 n.65 (1962).[6]

Mobil was prepared to prove that Hess' ownership of Marathon's marketing, refining and transportation assets would not violate the Clayton Act. Mobil's December 8 application to the district court pointed out that Hess did not market gasoline in any of the six states where the district court found that Mobil's ownership of Marathon's gasoline marketing business might violate the Clayton Act. Figures presented to the district court showed that

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5. Following the granting of the preliminary injunction in Filtrol Corp. v. Slick Corp., [1970] Trade Cas. (CCH) ¶ 73,035 (C.D. Cal. 1969), *aff'd per curiam*, 428 F.2d 826 (9th Cir. 1970), the offeror divested itself of certain of its subsidiaries, which eliminated the alleged antitrust violations. The injunction was then lifted and the acquisition went forward. Wall Street J., Nov. 17, 1971, at 17, col. 1; Wall Street J., May 26, 1972, at 14, col. 2.

6. As the cited cases demonstrate, divestiture of all or part of the offending assets is an accepted antitrust remedy, and in no sense would such a divestiture be an inappropriate "dismembering" of Marathon. (See A-10). In any event, if Steel obtains control of Marathon there can be no assurance that it will not sell substantial portions of Marathon's assets and the lower courts have not restrained such a sale. In fact, recent experience suggests that such a sale by Steel is not at all unlikely; shortly after DuPont won the recent tender offer contest for control of Conoco, it announced its intention to sell portions of Conoco's assets in order to reduce the debt incurred to make the acquisition. *See* Wall Street J., Dec. 9, 1981, at 5, col. 1. Mobil and Hess have a long tradition of commitment to the oil business, and, under their agreement, neither would be subject to financial pressures that would cause them to seek to sell off any Marathon assets if the curative divestiture plan is implemented.

in gasoline marketing, Hess and Marathon have only an insubstantial overlap. Evidence concerning Hess was not before the district court when it summarily denied Mobil's motion for curative divestiture on December 1, nor was it considered by the district court on December 9 when it refused to evaluate the Hess transaction. Thus, for present purposes it must be assumed that Mobil could in fact have proved that a Hess-Marathon combination would not violate section 7, since both courts below have held, in effect, that such a showing would have made no difference.[7]

The lower courts' decisions are particularly inappropriate in tender offer contests, since preliminary injunctions usually conclude the litigation. In those cases it is usually of no practical value to relegate an enjoined offeror to a subsequent trial on a permanent injunction.[8]

Petitioner recognizes that the issuance and administration of a preliminary injunction are generally inappropriate questions for consideration on certiorari. This is an unusual case, however, for in a major tender offer contest, the pressures of time preclude later review and the interim decision is in reality the ultimate decision. Thus, if this Court is to have an impact upon the course of litigation in the tender offer area, it must as a practical matter be prepared to do so at the preliminary injunction stage.

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7. Thus, no factual issue is raised by Mobil's application for certiorari and this Court is entitled to assume that a Marathon-Hess combination would not violate the law.

8. ABA Antitrust Section, Monograph No.1, *Mergers and the Private Antitrust Suit: The Private Enforcement of Section 7 of the Clayton Act, Policy and Law*, 33-34 (1977):

> An analysis of the reported cases indicates that the granting of preliminary relief barring the tender offer often effectively deterred a threatened takeover and that a full trial usually was never held. At least thirty-three judicial decisions have been rendered on motions for preliminary relief by target companies on the ground, inter alia, that the planned acquisition would violate Section 7 of the Clayton Act . . . .
>
> * * *
>
> In all reported cases but one where preliminary relief has been granted prohibiting the offeror from proceeding with a tender offer on the basis of alleged Section 7 violations, the offer has been withdrawn and a full trial on the merits has not been held.

Tender offers are not only increasing, but they serve important economic functions, contributing to the proper valuation of corporate assets and providing an incentive to improve performance by incumbent management. *See* F. Easterbrook & D. Fischel, *The Proper Role of a Target's Management In Responding to a Tender Offer*, 94 Harv. L. Rev. 1161, 1165-74 (1981). Moreover, the increasing pace of tender offers and the increasingly large economic impact of the transactions has tempted both incumbent management and competing offerors to employ federal litigation—often groundless—in a quest for temporary advantage. Because contested offers move quickly and litigation consumes time, those who sue may be reasonably confident that the underlying merits of their cases will never be tested. Unless this Court provides guidance and clarification concerning the proper steps for the lower federal courts to follow in these circumstances, such litigation is bound to increase, with a concomitant decrease in respect for the federal judicial process.

2. The Failure To Give Mobil A Hearing On Its Proposed Curative Divestiture Is Contrary To This Court's Controlling Decisions And Creates A Conflict Among The Circuits.

This Court held in *United States* v. *Swift & Co.*, 286 U.S. 106 (1932) that even a permanent injunction entered in an antitrust case by a federal court was subject to modification:

> A continuing decree of injunction directed to events to come is subject always to adaption as events may shape the need.
>
> * * *
>
> [A] court does not abdicate its power to revoke or modify its mandate if satisfied that what it has been doing has been turned through changing circumstances into an instrument of wrong.

286 U.S. at 114-15 (citations omitted).

Indeed, Justice Cardozo's above quoted language indicates that where justice requires courts have not only the power but the *duty* to modify injunctions. "A court must never ignore significant changes in the law or the circumstances underlying an injunction lest the decree be turned into an 'instrument of

wrong'." 11 C. Wright and A. Miller, *Federal Practice and Procedure: Civil*, § 2961 at 600 (1973). *See System Federation* v. *Wright*, 364 U.S. 642 (1961).

The opinion below conflicts with those of other courts of appeals which have heretofore confined injunctive relief to only what is necessary to solve the problems before them. *E.g., Life Investors, Inc.* v. *AGO Holding, N.V.*, [1981] Fed. Sec. L. Rep. (CCH) ¶ 98,356 (8th Cir. 1981) (injunction pending appeal included provision that either party could move to vacate if disclosure conditions were satisfied); *Prudent Real Estate Trust* v. *Johncamp Realty, Inc.*, 599 F. 2d 1140 (2nd Cir. 1979) (district court was ordered to issue injunction extending only for the time necesary to correct securities act violations); *see General Aircraft Corp.* v. *Lampert*, 556 F.2d 90, 97 (1st Cir. 1977). Indeed, the opinions conflict with the Sixth Circuit's treatment of a companion case to this action where the court held that Steel had violated the Williams Act by receiving two options in connection with its tender for Marathon.[9] The court of appeals did not, however, forever bar Steel's tender offer. Rather, it enjoined enforcement of the options and ordered appropriate curative action. Mobil is merely asking for a similar opportunity to cure what have preliminarily been determined to be illegal aspects of its offer.

A preliminary injunction, even more than a permanent injunction, may become an "instrument of wrong" if courts are blind to changing circumstances. A preliminary injunction serves only to preserve the status quo and is inherently changeable.

> [A] preliminary injunction—as indicated by the numerous more or less synonymous adjectives used to label it—is, by its very nature, interlocutory, tentative, provisional, ad interim, impermanent, mutable, not fixed or final or conclusive, characterized by its for-the-time-beingness.

Hamilton Watch Co. v. *Benrus Watch Co.*, 206 F.2d 738, 742 (2nd Cir. 1953).

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9. A copy of the court of appeals' opinion on the options is reproduced in the Appendix at A-42.

It may—and indeed *must*—be modified or dissolved when it unjustly and unnecessarily restrains lawful actions.

What is at issue on Mobil's application for certiorari is a stark question of law: whether, in a contested tender offer situation, one of the offerors—who is prepared promptly to demonstrate that a contract for curative divestiture removes the underpinnings of a preliminary injunction against its tender offer—may be summarily denied a hearing to modify that injunction with the result that victory in the contest is awarded to the competing offeror.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit, and this Court may wish to consider a summary reversal and remand.

Respectfully submitted,

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December 29, 1981

United States Court of Appeals
FOR THE SIXTH CIRCUIT

No. 81-3704, 81-3713

Filed December 23, 1981

MARATHON OIL COMPANY,
Plaintiff-Appellee,

v.

MOBIL CORPORATION; MOBIL OIL CORPORATION; MERRILL LYNCH, PIERCE, FENNER & SMITH INCORPORATED,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF OHIO

Before: EDWARDS, Chief Judge; ENGEL and MERRITT, Circuit Judges.

MERRITT, Circuit Judge. Section 7 of the Clayton Act, 15 U.S.C. § 18, provides that "no person ... shall acquire ... stock ... where in any line of commerce ... in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly." In this suit for injunctive relief under § 7, we review on an expedited basis a preliminary injunction issued November 30, 1981, by District Judge Manos blocking the proposed acquisition of Marathon Oil Company by Mobil Corporation announced October 30, 1981. We have considered the extensive briefs of the parties and the Joint Appendix consisting of detailed statistical and financial information describing the oil industry and concentration ratios in the exploration, production, transportation, refining, terminal

and retail phases of the industry, as well as affidavits and testimony of the economic experts of the parties, Mr. Scherer (Marathon) and Mr. Stigler (Mobil), and numerous officers and agents of the two companies. On December 17, 1981, the Court heard arguments of counsel. Based upon consideration of the case, we conclude that District Judge Manos did not err in issuing the preliminary injunction under Section 7 prohibiting the takeover.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294 (1962), the Supreme Court set out a number of factors to be considered in interpreting the standard of liability established in Section 7 of the Clayton Act in a horizontal merger case, including the following: "the relative size and number of the parties to the arrangement"; the "relevant market"; "the market shares which companies may control by merging"; "the history of tendency toward concentration in the industry"; "mitigating factors" demonstrating a "need for combination." Other cases like *United States* v. *E.I. DuPont de Nemours & Co.*, 351 U.S. 377, 3[sic] (1956) have added consideration of " 'cross-elasticity' of demand in the trade" as a consideration and "barriers to new entry," *Federal Trade Comm'n* v. *Proctor & Gamble Co.*, 386 U.S. 568 (1967).

Our conclusion that the District Court was correct in finding likelihood of success on the merits is based on a consideration of the following factors: (1) the size of the industry in comparison to the size of the economy of the nation; (2) concentration ratios in various lines and phases of the industry, particularly motor gasoline, and in various geographical markets of the industry; (3) the elasticity of the demand for petroleum and gasoline and the effect of this elasticity on the market power of the major oil companies, given their market shares; (4) barriers to the entry of new participants in the industry; (5) the conduct of members of the industry respecting joint ventures and exchange agreements at the exploration, production, transportation, refining and marketing stages of the industry; and (6) the possibility of increased economic efficiency and other benefits that could arise from the consummation of the merger.

1. Size

The size of the oil industry and the firms involved in it in relation to the overall economy is a factor to be considered. But it is only one factor to be considered in relationship to others. An industry and the firms within it may be very large and still be very competitive. Size becomes important for antitrust purposes when firms within an industry appear to possess market power or the power to raise prices above or restrict output below levels that would occur in a competitive marketplace. To the extent that an industry is not fully competitive, its large dollar size simply increases the dollar loss of the consumers who must pay higher prices.

Of the largest 20 industrial companies in the country, 13 are oil companies. Exxon is the largest industrial company in the nation and in the world with sales of $103 billion and net income of $5.65 billion. Mobil is the second largest industrial company. Mobil has sales of $63.7 billion and net income of $3.27 billion. The comparable figures for Marathon are $8 billion and $379 million. The total sales of the 13 largest oil companies are $421 billion. The oil industry dwarfs other major industries of the country in size and profits.

2. Concentration

In terms of dollar volume, motor gasoline is the largest end product produced by the oil companies. The parties agree, and the District Court found, that the market in motor gasoline is the most significant "line of commerce" affected under Section 7. A merger between Mobil and Marathon would produce market shares or concentration ratios for motor gasoline in various geographical markets of the country as follows: 50% in Muskegon, Michigan; 44% in Green Bay, Wisconsin; about 27% in Toledo and Columbus, Ohio; 20.44% in the State of Michigan; 17.80% in the State of Illinois; 17.44% in the State of Wisconsin; 17.13% in the State of Indiana; 16.7% in the State of Ohio; and 10% in the nation as a whole.

It seems clear that there are many geographical markets and submarkets for motor gasoline in the country. The District Court did not err in analyzing concentration ratios in defining relevant markets by state rather than limiting its consideration to the nation as a whole. On remand, the District Court will have an opportunity to further define and describe the relevant geographical markets and submarkets.

Mobil's main contention, and the argument of its economic expert, is that "motor gasoline prices in the nation tend to approach uniformity with due regard for transportation costs." They conclude from this that the country as a whole is the only relevant market. The District Court noted that this argument overlooks the evidence adduced by Marathon's economic expert of local price variations that transportation costs do not explain and the finding of the District Court that "the persistence of price differentials in various areas of the nation demonstrates that motor gasoline does not move from area to area in response to price changes easily or as readily as Mobil asserts." Mobil's theory does not explain why the parties in the actual operation of their business collect and analyze information and plan pricing and marketing strategies on the basis of states and metropolitan areas, as well as nationally and internationally.

Finally, the evidence shows that Marathon does not do business in approximately 28 states, and it is difficult to include within the relevant geographical market those states in which Marathon does not compete with Mobil. *See United States* v. *Marine Bankcorporation, Inc.*, 418 U.S. 602, 621-22 (1974).

3. Elasticity of Demand

Professor George Stigler of the University of Chicago Department of Economics, Mobil's main outside expert witness, testified:

> Two things enter the interpretation of a concentration ratio. One, what level do we worry about? And I must say that we have no precise point which is a critical point at which you must worry.

> And secondly, what is the elasticity of demand facing the industry we are talking about? (App. 2220.)

This is the same basic point that Professor Areeda makes: "Market power . . . is a matter of degree measured by the responsiveness (or 'elasticity') of buyer demand to price changes." *Antitrust Analysis*, § 229 (2d ed. 1974). Although Professor Stigler did not testify about the responsiveness of demand to price change in the oil business, other portions of the record indicate that the demand for crude oil and gasoline is relatively inelastic. Since the Arab oil embargo in 1973 the price of crude oil has risen from $3.00 a barrel to $35.00 a barrel, a ten-fold increase in price; and demand has declined only moderately. Likewise, gasoline prices over the same period have risen more than three fold, but demand has remained relatively constant. Where demand is unresponsive to price in a large industry on which the nation is dependent for its economic health, the courts must be especially vigilant in the enforcement of the antitrust laws for in such an industry competition is more difficult to maintain.

4. Barriers to Entry

The petroleum industry is characterized by high barriers to entry because of capital requirements. For example, Marathon's last refinery in Louisiana cost $700 million to build, and the cost figure would now be around $1 billion. It is unlikely that a new vertically integrated oil company would enter the market to take Marathon's place as a competitor and supplier for independent dealers. The cost of exploration, drilling and production and the cost of facilities for refining and distribution are great. Mobil's own documents show that new entry is "prohibitively expensive." (App. 2064.)

5. Joint Operations in the Oil Industry

The testimony below clearly indicates that the oil industry is characterized by a complex set of close working relationahips:

joint ventures for crude oil exploration and production; joint operation of pipelines and transportation; exchange agreements under which the companies swap among themselves crude oil and refined products from one location or terminal to another. Marathon's expert testified:

REDIRECT EXAMINATION OF FREDERIC M. SCHERER

BY MR. MCCARTAN:

Q. Dr. Scherer, Mr. Murphy asked you several questions about concentration in the oil industry.

I want to ask you whether, based upon your studies of American industry in general, are you aware of any industry which has as many partnerships and joint venture arrangements among the largest companies in the industry as the petroleum industry?

A. No, sir. I am not aware of any, and I have looked very hard for alternative examples, and I never have been able to find one.

Q. At what level and function phases of the operation in the petroleum industry do you find these joint ventures and partnership arrangements?

A. Certainly at the crude level, and certainly at the pipeline level, and after that things get into the realm of semantics.

. . . .

Q. And you also have arrangements called processing arrangements?

A. Oh, yes.

For example, if somebody were shutting down a catalytic cracker, and then they were going to lack the capacity for three months, and they would go to an adjacent refinery owned by a competitor, and they would ask, "Will you do our cracking for us during this period while our cracker is down, and when your cracker is down, we will reciprocate."

You have those arrangements, too, yes, sir.

Q. So is it true that the industry at every level from crude exploration right down to terminals, they have such interdependent relationships and arrangements among large companies?

A. Yes; there are all kinds of joint ventures and swaps and horizontal trades and the like at all levels.

. . . .

RECROSS-EXAMINATION OF DR. FREDERIC M. SCHERER

BY MR. SAMUEL MURPHY:

Q. Does Marathon, that you know of, engage in—I think your language was swaps, horizontal trades, and joint ventures, of the kind that Mr. McCartan asked you about on redirect examination?

A. Yes, sir, certainly, yes.

Certainly swaps, and certainly joint ventures on pipelines, and I don't know about refinery operations.

Q. The zillions of exchanges that you referred to are exchanges, are a way in which a supplier can participate in a [market despite the fact that he does not himself have a producing plant there?]

A. They are one way, but I never really have been able to figure out why the use of exchanges is so prevalent.

If somebody at Point A has supply that they are willing to give to Company X on a swap, why aren't they willing to sell it directly to Company X? I never quite understood that. (App. 503-10.)

Moreover, the President of Mobil, along with the representatives of several other major oil companies, sits on the Board of Aramco in Saudi Arabia where he advises and apparently influences to some extend the pricing and output policies of the Saudis, the price leader and dominant member of the OPEC cartel.

6. Benefits

Mobil Corporation did not convince the District Court that the merger would benefit the economy, increase operating efficiency, bring advantages of scale, or substitute better management. Mobil's reasons for the acquisition, according to the testimony of

its President, Mr. Tavoulareas, and others, seem to be that Marathon's stock was underpriced in the market and that Marathon's valuable Yates Field in Texas would provide Mobil with additional needed domestic crude oil reserves. We do not see that it is of particular benefit to the national economy to substitute Mobil ownership of the Yates Field for Marathon ownership, and it may be disadvantageous. It may reduce Mobil's incentives to explore and find its own new domestic reserves.

In addition, as the District Court found, since Marathon operates on a retail basis primarily through independent dealers and private brand outlets and Mobil does not, the merger could eliminate or reduce the healthy competitive effect that independent dealers and multiple private brands have on the retail market for motor gasoline. Any conceivable benefits are more than offset by the potential elimination of Marathon as a supplier of price conscious independents. On this subject the District Court found:

> Approximately, 15 percent of Marathon's total gasoline sales are made to independent branded jobbers, branded distributors and branded dealers in the states of Illinois, Indiana, Kentucky, Michigan, Ohio and Wisconsin. This gasoline is eventually resold at retail under the Marathon brand. The remaining 85 percent of Marathon's gasoline sales are made by its Wholesale Marketing Division at a terminal rack price or tankwagon price. All such sales are unbranded and are made in the following estimated quantities to the following three (3) categories of customers: (1) 10 percent of Marathon's gasoline sales are made to seven (7) companies in which Marathon owns a minimum 50 percent equity interest; (2) 25 percent of Marathon's total gasoline sales are made to the Emro Marketing Company, a wholly owned subsidiary of Marathon which resells at retail under the Gastown, Speedway, Bonded and Consolidated brands; and (3) 50 percent of Marathon's total gasoline sales are made to over 1100 independent businesses which resell either at wholesale or retail prices. Approximately 60 percent of all gasoline sold by Marathon is eventually resold at retail prices that are generally several cents per gallon below that sold in Mobil branded outlets. Slip op. at 3.

Based on Mobil's past practice of selling gasoline only through Mobil stations, it seems unlikely that Mobil would continue to service the independents in times of shortage.

7. Conclusion

The foregoing factors when considered together lead us to the firm conclusion that the District Court did not err in finding a strong probability that Mobil's proposed acquisition of Marathon violates the antitrust laws. The industry is extremely large in size and the market shares of the two companies represent huge dollar figures. The concentration ratios of the two companies in relevant markets and submarkets range from 10% to 20%. These market shares are within the range that economists and the Antitrust Division of the Department of Justice believe confer market power and lead companies to charge monopoly prices and engage in other uncompetitive behavior. There is evidence that this market power would be reinforced by the relative inelasticity of demand for gasoline and the difficulty of entry into the business. Indeed the many joint arrangements and operations in which members of the industry engage already may provide the opportunity for collusion on price and output. Concentration of this economic power in fewer hands in such a large industry with these characteristics increases the risk of uncompetitive behavior and, ultimately, may undermine the confidence of the public in the free market system. The District Court's view of the probable illegality of this particular merger is supported by the fact that the competitor to be eliminated is a substantial independent alternative source of supply of crude oil and motor gasoline for independent dealers, who are the most competitive factor in the industry at the wholesale and retail levels.

We also conclude that the District Court did not abuse its discretion in rejecting Mobil's proposed "hold separate order" which was orally advanced after the preliminary injunction was granted.

We hold that the findings of fact entered by Judge Manos are not clearly erroneous. Generally, but without endorsing all of his

reasoning, we accept his conclusions of law. This record shows that Marathon has been a substantial supplier of independent gasoline marketers (60% of all motor gasoline sold by Marathon is eventually resold at retail prices below Mobil's. *E.g., Marathon Oil Co.* v. *Mobil Corp.*, No. C81 2193, slip op. at 3 (N.D. Ohio Nov. 30, 1981); App. 1534-35 (affidavit of G. Norman Nicholson, Vice President for Marketing, Marathon Oil Co.)). Our prime concern is the preservation of some competition in this market, which a dismembering of Marathon could damage. Therefore, because of the likelihood, as found by the District Judge, of the finding of violation of antitrust laws being made after the hearing on the petition for a permanent injunction[1] the Mobil Corporation stands enjoined from purchasing shares of the Marathon Oil Company until and unless Mobil is freed from temporary injunctive relief after full trial at the District Court level, or unless the effectiveness of this order is stayed or overruled by the Supreme Court of the United States.

Accordingly, the judgment of the District Court is affirmed.

1. On this record, we believe that there is a strong probability of such a finding.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed November 30, 1981

CASE NO. C81-2193

MARATHON OIL COMPANY,

Plaintiff,

v.

MOBIL CORPORATION, etc., *et al.*,

Defendants.

MEMORANDUM OF OPINION AND ORDER

On November 1, 1981 plaintiff, Marathon Oil Company, (hereinafter Marathon), filed the above-captioned case under Section 16 of the Clayton Act, 15 U.S.C. § 28, to enjoin the proposed acquisition of Marathon by the defendant, Mobil Corporation, (hereinafter Mobil), on the ground that a merger of the two companies would violate Section 7 of the Clayton Act, 15 U.S.C. § 18.[1] The case is currently before this court on Marathon's motion for a preliminary injunction. On the motion the parties primarily rely on affidavits, on statistical data and on facts developed at an evidentiary hearing.

1. 15 U.S.C. § 18 provides in pertinent part:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

Marathon is an Ohio corporation with its principal place of business in Findlay, Ohio. Mobil is a Delaware corporation with its principal place of business in New York, New York. The defendant, Mobil Oil Corporation, (hereinafter referred to collectively as Mobil), is a New York corporation with its principal place of business is [sic] New York, New York. Both Marathon and Mobil are large integrated petroleum companies and are among the seventeen major integrated petroleum companies in the United States.

Mobil has total assets of 32.7 billion dollars. In 1980 it had total revenues of 63.7 billion dollars and net income of 3.27 billion dollars[2] making it the second largest industrial company in the United States ranked by sales. Mobil has domestic crude oil reserves of 759 million barrels and domestic natural gas reserves of 5,754 billion cubic feet. It operates six (6) refineries in this country with a combined capacity of 859,700 barrels per day and ranks seventh among domestic refiners. In 1980 Mobil sold 6.55 billion gallons of motor gasoline which accounted for 6.3 percent of total domestic sales and ranked fourth among domestic sellers. Mobil owns the largest number of crude oil gathering pipelines in the United States and ranks second in the United States in total domestic crude oil pipeline mileage. In 1980 Mobil ranked fourteenth in the United States in the amount of refined petroleum products delivered over wholly owned domestic product pipelines. Mobil owns and operates over one hundred (100) petroleum terminals in the United States.

Marathon has total assets of 5 billion dollars. In 1980 it had total revenues of 8.75 billion dollars and net income of 379 million dollars making it the thirty-ninth largest industrial company in the United States. Marathon has domestic crude reserves of 644 million barrels and domestic natural gas reserves of 1.644 billion cubic feet. It operates four (4) refineries in this country with a combined capacity of 588,000 barrels per day and ranks ninth among domestic refiners. In 1980 Marathon sold 3.83 billion gallons of motor gasoline which accounted for 3.7 percent of total

2. The net income figure includes an extraordinary gain net of tax realized from the sale of Mobil's interest in the Belridge Oil Company.

domestic sales and ranked twelfth among domestic sellers. Marathon wholly owns approximately 2600 miles of crude oil pipelines and 1400 miles of refined products pipelines in the United States. It possesses a joint ownership interest in an additional 2000 miles of crude oil pipelines and 1700 miles of refined products pipelines. In 1980 Marathon ranked fifth in the United States in the amount of refined petroleum products delivered over wholly owned domestic product pipelines. Marathon owns and operates forty-nine (49) petroleum terminals in the United States.

Mobil markets motor gasoline on a nationwide basis primarily through Mobil brand outlets. Marathon, on the other hand, markets motor gasoline in a twenty-one (21) state area. Approximately, 15 percent of Marathon's total gasoline sales are made to independent branded jobbers, branded distributors and branded dealers in the states of Illinois, Indiana, Kentucky, Michigan, Ohio and Wisconsin. This gasoline is eventually resold at retail under the Marathon brand. The remaining 85 percent of Marathon's gasoline sales are made by its Wholesale Marketing Division at a terminal rack price or tankwagon price. All such sales are unbranded and are made in the following estimated quantities to the following three (3) categories of customers: (1) 10 percent of Marathon's gasoline sales are made to seven (7) companies in which Marathon owns a minimum 50 percent equity interest; (2) 25 percent of Marathon's total gasoline sales are made to the Emro Marketing Company, a wholly owned subsidiary of Marathon which resells at retail under the Gastown, Speedway, Bonded and Consolidated brands; and (3) 50 percent of Marathon's total gasoline sales are made to over 1100 independent businesses which resell either at wholesale or retail prices. Approximately 60 percent of all gasoline sold by Marathon is eventually resold at retail prices that are generally several cents per gallon below that sold in Mobil branded outlets. Mobil admits that its proposed acquisition of Marathon would make Mobil the largest marketer of motor gasoline in the United States with almost 10 percent of the national market.

Marathon alleges in its complaint that, in violation of Section 7 of the Clayton Act, the effect of the proposed acquisition may be to substantially lessen competition in the: exploration and production of crude oil; refining of crude oil; transportation of crude oil and refined petroleum products; and marketing of refined petroleum products, including motor gasoline, in certain regional,[3] state[4] and local[5] markets. The complaint further alleges that the effect of the proposed acquisition may be to substantially lessen competition because Marathon would be eliminated as a major supplier of gasoline to independent marketers. In response to Marathon's allegations, Mobil asserts that the relevant geographic market is nationwide and that, when so viewed, the effect of the proposed acquisition will not be to substantially lessen competition since the increase in concentration in the petroleum industry resulting from the acquisition would be de minimus. Mobil also argues that it would continue the supply of gasoline to independent marketers because of the tremendous refining capacity that it would have upon the acquisition of Marathon. Therefore, the proposed acquisition would not have an adverse effect on competition.

The United States Supreme Court has established the basic standards to be applied by the courts in suits brought under

3. In 1950, the Petroleum Administration for Defense established five (5) Petroleum Allocation for Defense Districts, commonly known as "PADs," for the purpose of reflecting geographic regions of the petroleum industry considered natural in character. The PADs are numbered I-V. PAD I includes all states bordering on the Atlantic Ocean as well as Pennsylvania, West Virginia and Vermont. PAD II includes the states of Ohio, Indiana, Kentucky, Tennessee, Michigan, Wisconsin, Illinois, Missouri, Iowa, Minnesota, Oklahoma, Kansas, Nebraska, South Dakota and North Dakota. PAD III includes the states of Alabama, Mississippi, Arkansas, Louisiana, Texas and New Mexico. PADs IV and V include the remaining western and northwestern states. Marathon alleges that the effect of the proposed acquisition may be to substantially lessen competition in PADs II and III individually and in PADs II and III combined.

4. The states of primary concern are: Illinois, Indiana, Michigan, Ohio, Tennessee, Wisconsin and Florida or a combination thereof.

5. Marathon has submitted to the court a study of motor gasoline sales and market shares of both Mobil and Marathon for thirty-six (36) standard Metropolitan Statistical Areas, commonly known as SMSAs, located in Illinois, Indiana, Ohio, Michigan and Wisconsin.

Section 7 of the Clayton Act in a series of cases beginning with *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S. Ct. 1502 (1962), and following with such cases as *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 83 S. Ct. 1715 (1963); *United States* v. *El Paso Natural Gas Co.*, 376 U.S. 651, 84 S. Ct. 1044 (1964); *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 84 S. Ct. 1283 (1964); *United States* v. *Penn-Olin Chemical Co.*, 378 U.S. 158, 84 S. Ct. 1710 (1964); *United States* v. *Continental Can Co.*, 378 U.S. 441, 84 S. Ct. 1738 (1964); *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 86 S. Ct. 1478 (1966); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 86 S. Ct. 1665 (1966); and *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 94 S. Ct. 1186 (1974).

In construing the legislative history of Section 7 of the Clayton Act as amended, the United States Supreme Court in *Brown Shoe*, reasoned that:

> The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy. . . .

370 U.S. at 315, 82 S. Ct. 1502. Clearly, the greater the degree of concentration in a particularly [sic] industry, "the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge." *United States* v. *Aluminum Co. of America*, 377 U.S. 271, 280, 84 S. Ct. 1283, 1289 (1964). *See also: United States* v. *Philadelphia National Bank*, 374 U.S. 321, 363, 83 S. Ct. 1715, 1741, 1742 (1963); *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226, 1231 (C.D. Calif. 1973), *aff'd.*, 418 U.S. 906, 94 S. Ct. 3199 (1974). "It is the basic premise of [Section 7] that competition will be most vital when there are many sellers; none of which has any significant market share." *United States* v. *Aluminum Co. of America*, *supra*, 377 U.S. at 280, 84 S. Ct. at 1289. Thus, although a vast amount of scholarly literature has been published regarding Section 7 of the Clayton Act, its interpretation is not difficult. Section 7 merely

proscribes mergers which lessen competition in any line of commerce in any section of the country. As established in *Brown Shoe*, the section does not prohibit all mergers. What Congress intended in enacting Section 7 was to arrest restraints of trade and/or monopolistic tendencies "in their incipiency and well before they have attained such effects as would justify a Sherman Act proceeding."[6] *See: United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd. sub. nom.*, *Bartlett* v. *United States*, 401 U.S. 986, 91 S. Ct. 1233 (1971).

Although Section 7 of the Clayton Act is concerned with the proscription of mergers that may have substantial anti-competitive effects, it is neither directed at the possibility that anti-competitive effects might occur, nor at the certainty of such effects. In *United States* v. *E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 598, 77 S. Ct. 872, 880 (1957), the United States Supreme Court held that "proof of a mere *possibility* of a prohibited restraint or tendency to monopoly will not establish the statutory requirement that the effect of an acquisition "may be" such restraint or tendency . . ." (emphasis supplied). Section 7 only "concerns itself with the reasonable probability of the lessening of competition or tendency toward monopoly as a result of the particular merger being scrutinized—a showing that such effects are reasonably likely to occur." *United States* v. *Atlantic Richfield Co.*, *supra*, 297 F. Supp. at 1066. As succinctly reasoned by the *Atlantic Richfield* court:

> Thus, mergers are proscribed where substantial anti-competitive effects or tendency to monoply are reasonably probable in *any* line of commerce in *any* section of the country. In order to determine whether there are substantial anti-competitive effects or tendency to monopoly, it is necessary in each case to define the relevant product market in which it is claimed that such effects will occur, and the section or sections of the country affected. The probability of anti-competitive effects and their substantiality cannot be evaluated in a vacuum. They can only be

6. S. Rep. No. 1775, 81st Cong., 2d Sess., pp. 4-5 (1950), U.S. Code Congressional Service 1950, p. 4293.

> judged in terms of the particular markets affected, that is, "within the area of effective competition." (Emphasis supplied). (Footnote omitted).

Id.

For the purposes of the preliminary injunction, no dispute exists between the parties about motor gasoline being the relevant product market.[7] The crucial question presented is whether the relevant geographic market is nationwide or something less. Of course, upon determining the relevant geographic market, the court must decide whether the effect of the proposed acquisition may be to substantially lessen competition in the sale of motor gasoline within the outer boundaries of that particular geographic market. In any event, this case is before the court on Marathon's motion for a preliminary injunction, not on the ultimate merits of any of the substantive issues. The court must merely decide whether the moving party has shown a likelihood of success on the merits of the case, that it will suffer irreparable harm if a preliminary injunction is not issued, that a preliminary injunction is in the public interest and that the moving party has no adequate remedy at law. *See generally*: *United States* v. *Atlantic Richfield Co., supra*; *Muskegon Piston Ring Co.* v. *Gulf & Western Industries, Inc.*, 328 F.2d 830 (6th Cir. 1964).

In examining the criteria in the inverse order in which they are listed above the court finds that Marathon, would have no adequate remedy at law if the acquisition was subsequently found to violate Section 7 of the Clayton Act because no satisfactory method exists that would restore Marathon to its present competitive position in the marketplace. The disruption of a business the size of Marathon cannot be ignored even in light of the remedy of divestiture. Similarly, the mere possibility that Marathon would be eliminated as an effective competitor from the marketplace is sufficient to satisfy the public interest criterion. If the acquisition of Marathon by Mobil was subsequently found to

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7. Although the parties do dispute whether other distinct product markets exist, (e.g., terminalling services), resolution of such issues is not necessary at this stage of the proceedings.

violate Section 7 of the Clayton Act, it, of necessity, would be to substantially lessen competition. Since a lessening of competition in nearly any area of the economy is detrimental to the public, Marathon has satisfied the public interest criterion.

The determination of irreparable harm, like the determination of the first two criteria, is not difficult to make. A basic goal of a preliminary injunction in a case such as this is the maintenance of the status quo to assure that the firm which is the target of the proposed acquisition will remain a viable, independent, competitive entity if it ultimately prevails on the merits. If preliminary injunctive relief is not available to a firm such as Marathon, an acquiring firm such as Mobil could irreparably alter the competitive position of Marathon prior to divestiture by terminating business relationships with its customers, learning and/or disclosing confidential trade secrets or research efforts and/or discharging or permanently dislocating emplolyees. Accordingly, Marathon has satisfied the irreparable harm standard. It is to the final criterion, the likelihood of success on the merits of the case—an assessment which suffuses the other factors requisite to a preliminary injunction—to which the court shall now focus its attention.

As noted above the crucial question presented for resolution is whether the relevant geographic market is nationwide or something less. Mobil asserts that the relevant geographic market for measuring the effect on competition of its proposed acquisition of Marathon is the continental United States or, at the very least, the region east of the Rocky Mountain chain including every state within which Marathon does business. Mobil's premise is that prices of motor gasoline tend toward uniformity[8] nationwide and that because of the pressures of demand and supply, the relevant geographic market for measuring the competitive impact of acquiring Marathon is not simply the geographic regions in which both Mobil and Marathon do business. Stated otherwise, if prices within different parts of the continental United States, tend

8. Price uniformity is defined as price equality. Mobil asserts that the price of motor gasoline, with due allowance for transportation costs, tends toward uniformity nationwide.

toward uniformity, these precise geographic areas constitute a single market since changes in the price of the product in one area will affect prices in another area. Mobil further asserts that such a pricing analysis is unaffected by random pricing disparities in particular areas because such disparities at certain points in time provide an insufficient base upon which to conduct an examination. Mobil reasons what is crucial is that prices tend toward uniformity over time.

Another reason Mobil offers as support for its contention that the relevant geographic market is nationwide is that there are substantial flows of refined products, including motor gasoline, and crude oil throughout vast regions of the United States. Mobil asserts that when the nation's crude oil and refined product transportation modes are examined the conclusion is inescapable that the relevant geographic market is nationwide for two reasons: first, there is substantial "exporting" of motor gasoline from PAD III into PADs I and II; and second, there are significant imbalances existing between refinery production and consumption of motor gasoline in all of the states which comprise each PAD district.

An additional factor which Mobil claims establishes a relevant geographic market nationwide is the testimony of independent marketers of motor gasoline who buy motor gasoline from the cheapest source of supply available notwithstanding the distances that exist between points of supply and points of resale. In constructing this argument Mobil relies heavily on the testimony of one of its witnesses, an independent marketer of motor gasoline in both the Pittsburgh, Pennsylvania and Savannah, Georgia areas, who related that he had frequently purchased motor gasoline from locations as distant from his retail outlets as New York, New York and Houston, Texas.[9]

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9. A great number of such purchases are facilitated in the petroleum industry generally through the use of what is commonly referred to as an exchange agreement. An exchange agreement is an agreement by which one company's refined petroleum products are exchanged with those of another company at widely disparate locations. Theoretically, on the supply side, exchange agreements afford a means for a producer of motor gasoline to enter and compete for sales in geographic areas

Other than *United States* v. *General Dynamics Corp.*, 415 U.S. 488, 94 S. Ct. 1186 (1974), the major cases construing the scope and effect of Section 7 of the Clayton Act were decided by the United States Supreme Court in the nineteen-sixties. Since that time the petroleum industry has been radically changed by over a decade of rigid domestic price and supply controls and by the influence of the uncertainty of foregin sources of crude oil. These changes may reflect the need to reevaluate the rationale upon which the prior decisions were premised in so far as the petroleum industry is concerned.

However, evaluating Mobil's contention, first from the standpoint of practicalities, reveals that as a general rule, due to increased transportation costs, retailers of motor gasoline do not acquire their refined product in geographic areas of the nation which are remote to their places of business.[10] Similarly, at the gasoline pump, consumers do not customarily journey out of a locality to purchase motor gasoline. Such facts tend to show that the relevant geographic market for motor gasoline is something less than nationwide.

Second, although the empirical evidence indicates that over time the price of motor gasoline tends toward uniformity, it does not indicate conclusively the reasons for the existence of price differentials in various local geographic regions throughout the nation. There is little doubt that price differentials do exist over time[11] and that their magnitude is significant when compared to a

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where that producer possesses no physical distribution facilities. On the demand side, exchange agreements provide purchasers with wide geographic areas from which to secure supplies of motor gasoline. When questioned regarding the frequency of industry use of exchange agreements, Marathon's expert witness replied that they numbered in the "zillions."

10. The evidence submitted regarding exchange agreements is simply inconclusive when considered for the purpose of establishing a relevant geographic market that is nationwide. Although testimony established that the practice of entering such agreements is pervasive, it also estalbished [sic] that such agreements are inherently unreliable when considered as a substitute for a long term source of supply. Indeed, Mobil itself has withdrawn from certain areas where it had relied solely on exchange agreements rather than its own terminal and distribution system.

11. Depending, of course, on the geographic region examined.

petroleum company's profits. The persistence of price differentials in various areas of the nation demonstrates that motor gasoline does not move from area to area in response to price changes easily or as readily as Mobil asserts. Rather, they indicate that the relevant geographic market for motor gasoline is something less than nationwide. Clearly, such an analysis must be more fully developed at a trial on the merits.

Historically, the "any section of the country" phrase contained in Section 7 of the Clayton Act has been defined as any geographic market or submarket in which an adverse competitive effect may result from an acquisition. *See: Brown Shoe Co.* v. *United States,* 370 U.S. 294, 82 S. Ct. 1502 (1962). In *United States* v. *Pabst Brewing Co.,* 384 U.S. 546, 86 S. Ct. 1665 (1966), the United States Supreme Court elaborated on this definition as follows:

> Congress did not seem to be troubled about the exact spot where competition might be lessened; it simply intended to outlaw mergers which threatened competition in any or all parts of the country. Proof of the section of the country where the anticompetitive effect exists is entirely subsidiary to the crucial question in this and every § 7 case which is whether a merger may substantially lessen competition anywhere in the United States.

384 U.S. at 549, 550, 86 S. Ct. at 1663. In *United States* v. *Philadelphia National Bank,* 374 U.S. 321, 357, 83 S. Ct. 1715, 1738 (1963), the Court held that, in the context of the case before it, "the proper question to be asked . . . is not where the parties to the merger do business or even where they compete, but where within the area of competitive overlap, the effect of the merger on competition will be direct and immediate." As a general rule, however, "any section of the country" does encompass "the market area in which the seller operates, and to which the purchaser can practicably turn for supplies." *Tampa Electric Co.* v. *Nashville Coal Co.,* 365 U.S. 320,327, 81 S. Ct. 623, 628 (1961). The relevant geographic market can be as large as the United States or as small as a single metropolitan area. *See:*

United States v. *E. I. Du Pont de Nemours & Co.*, 353 U.S. 586, 77 S. Ct. 872 (1957), (United States); *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 86 S. Ct. 1665 (1966), (United States, Wisconsin, Illinois and Michigan combined and Wisconsin alone); *United States* v. *Atlantic Richfield Co.*, 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd sub. nom.*, *Bartlett* v. *United States*, 401 U.S. 986, 91 S. Ct. 1233 (1971), (Virginia, North Carolina, South Carolina, Georgia and Florida); *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Calif. 1973); *aff'd.*, 418 U.S. 906, 94 S. Ct. 3199 (1974), (California); *United States* v. *Philadelphia National Bank*, 374 U.S. 321, 83 S. Ct. 1715 (1963), (Philadelphia); *United States* v. *Von's Grocery Co.*, 384 U.S. 270, 86 S. Ct. 1478 (1966), (Los Angeles).

The only decision rendered by the United States Supreme Court which differed somewhat from the precedents listed above is *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 94 S. Ct. 1186 (1974). In *General Dynamics*, the Court held lawful a merger among firms producing coal in Illinois and some surrounding areas although the merger raised the concentration of production in that region from 43 percent to 63 percent in the top four (4) firms. The Court's decision was premised on two grounds. First, the relevant geographic market was held to be much broader than that alleged by the United States Department of Justice. Second, the Court held that the district court properly considered certain factors which peculiarly affected the coal industry as a whole as well as the structure of the two corporations at issue, including the lack of adequate coal reserves of the acquired corporation, in reaching its conclusion that the merger was one which would not substantially lessen competition.[12]

In six (6) states[13] in the midwestern United States and eastern portion of PAD II, Mobil and Marathon are substantial marketers of motor gasoline. In 1980 Mobil's sales accounted for 4.97

12. With regard to geographic markets, commentators have observed that the *General Dynamics* holding "loosened the precedent that "any" significant market would show a violation." W. Shepherd & C. Wilcox, Public Policies Toward Business 178 (6th ed. 1979).

13. Illinois, Indiana, Michigan, Ohio, Tennessee and Wisconsin.

percent of all sales in Illinois, 2.55 percent of all sales in Indiana, 7.69 percent of all sales in Michigan, 2.75 percent of all sales in Ohio, 4.49 percent of all sales in Tennessee and 8.15 percent of all sales in Wisconsin. Marathon's sales accounted for 12.84 percent of all sales in Illinois, 14.59 percent of all sales in Indiana, 12.75 percent of all sales in Michigan, 13.95 percent of all sales in Ohio, 5.95 percent of all sales in Tennessee, and 9.29 percent of all sales in Wisconsin. During this period Mobil's total sales ranked fifth in Illinois, ninth in Indiana, fourth in Michigan, ninth in Ohio, tenth in Tennessee and third in Wisconsin while Marathon's total sales ranked second in Illinois, second in Indiana, second in Michigan, second in Ohio, sixth in Tennessee and second in Wisconsin. A combined Mobil-Marathon would lead to the following sales percentages and rankings: 17.80 percent of all sales in Illinois, second; 17.13 percent of all sales in Indiana, first; 20.44 percent of all sales in Michigan, first; 16.70 percent of all sales in Ohio, second; 10.44 percent of all sales in Tennessee, second; and 17.44 percent of all sales in Wisconsin, first.[14] In the states analyzed, a combined Mobil-Marathon would change the four-firm concentration ratios[15] in the following manner: from 48 percent to 53 percent of all sales in Illinois; from 47.1 percent to 49.6 percent of all sales in Indiana; from 45.2 percent to 51.5 percent of all sales in Michigan; from 53 percent to 55.8 percent of all sales in Ohio; from 40.4 percent to 44 percent of all sales in Tennessee; and from 38.1 percent to 43.5 percent of all sales in Wisconsin.

In *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 82 S. Ct. 1502 (1962), the Government brought an action to enjoin the proposed merger of Brown Shoe Company and G. R. Kinney Company, Inc., on the ground that the proposed merger would violate Section 7 of the Clayton Act. The horizontal aspects of the proposed merger focused upon the retail outlets of the two

14. Rounded figures.

15. Accepted measures of concentration in a particular industry include the four-and eight-firm concentration ratios which measure the market shares held by the top four and eight firms in a market and the Herfindahl Index which is the sum of the squared market shares of all firms in a market.

competing companies. The relevant geographic market was determined to be cities with populations in excess of 10,000. The relevant lines of commerce were determined to be men's, women's and children's shoes. In one hundred and eighteen (118) of the cities surveyed the combined market share of the two companies was found to exceed 5 percent. Indeed, in some of the cities the combined market share was found to be as high as 57 percent. Although the retail shoe market was found to be rather fragmented, the Government produced evidence establishing increasing trends toward concentration. The United States Supreme Court held the merger to be a violation of Section 7 of the Clayton Act:

> The market share which companies may control by merging is one of the most important factors to be considered when determining the probable effects of the combination on effective competition in the relevant market. If a merger achieving 5% control were now approved, we might be required to approve future merger efforts by Brown's competitors seeking similar market shares. The oligopoly Congress sought to avoid would then be furthered and it would be difficult to dissolve the combinations previously approved. (Footnotes omitted).

370 U.S. at 343-344, 82 S. Ct. at 1534. The Court found the industry trend toward concentration particularly relevant, emphasizing "[w]e cannot avoid the mandate of Congress that tendencies toward concentration in industry are to be curbed in their incipiency, particularly when those tendencies are being accelerated through giant steps striding across a hundred cities at a time." *Id.* at 346, 82 S. Ct. at 1535.

In one of the last major horizontal merger cases to be decided by the United States Supreme Court, *United States* v. *Pabst Brewing Co.*, 384 U.S. 546, 86 S. Ct. 1665 (1966), the Government challened[sic] the acquisition by Pabst Brewing Company of the Blatz Brewing Company. In 1958 Blatz was the eighteenth largest brewer of beer in the United States while Pabst was the tenth largest brewer. Combined the two companies ranked fifth with 4.49 percent of the beer industry's total national sales.

In Wisconsin, before the merger, Blatz and Pabst ranked fourth and first respectively. After the merger Pabst ranked first with 23.95 percent of that market. In the three state area of Wisconsin, Illinois and Michigan, Blatz and Pabst ranked sixth and seventh respectively. Combined their sales accounted for 11.32 percent of the total sales in that three state market. At that point in time, the brewing industry had experienced a pronounced trend toward concentration. Nationally, the ten (10) leading brewers accounted for 52.6 percent of all sales in 1961 while in 1957 they had accounted for a smaller but substantial 45.06 percent. In Wisconsin, Illinois and Michigan the market share of the eight leading brewers had increased from 58.93 percent to 67.65 percent during the same period of time. In Wisconsin alone in 1961, the four largest brewers accounted for 58.62 percent of the market. Placing primary reliance on the market shares of the two companies and the increasing trend toward concentration in the industry the Court found the merger to be a violation of Section 7 of the Clayton Act in "each and all" of the three geographic regions analyzed, i.e., in the United States as a whole, in the three state area of Wisconsin, Illinois and Michigan and in the state of Wisconsin alone.

In *United States* v. *Atlantic Richefield Co.* [sic], 297 F. Supp. 1061 (S.D.N.Y. 1969), *aff'd. sub. nom., Bartlett* v. *United States*, 401 U.S. 986, 91 S. Ct. 1233 (1971), the Government challenged the merger of the Atlantic Richfield Company and the Sinclair Oil Company. Both Atlantic and Sinclair were large integrated petroleum companies and at the time ranked among the nineteen major integrated oil companies in the United States. The relevant line of commerce was determined to be the marketing of motor gasoline and the relevant geographic market was determined to be the five state area of Virginia, North Carolina, South Carolina, Georgia and Florida where the two companies were substantial competitors. In the first nine months of 1968 Atlantic's sales accounted for 2.3 percent of this market while Sinclair's sales accounted for 5.1 percent. Combined, therefore, the sales of Atlantic and Sinclair accounted for 7.4 percent of all

sales in the southeastern United States. During the period analyzed Atlantic and Sinclair ranked twelfth and ninth respectively in total sales and combined their ranking would have been sixth. After finding that substantial barriers to entry existed in the petroleum industry and that the industry had experienced a recent wave of mergers tending to increase industry concentration, the district court found that the Government had established a reasonable probability that it would succeed at trial on the issue of probable substantial lessening of competition in the southeast as a result of the proposed merger and granted its motion for a preliminary injunction. This decision was subsequently affirmed without opinion by the United States Supreme Court.

Similarly, in *United States* v. *Phillips Petroleum Co.*, 367 F. Supp. 1226 (C.D. Calif. 1973), *aff'd.*, 418 U.S. 906, 94 S. Ct. 3199 (1974), the Government challenged the acquisition by the Phillips Petroleum Company of the Tidewater Oil Company. At the time the complaint was filed, Phillips and Tidewater each engaged in the acquisition of oil and natural gas lands, the production of crude oil and natural gas, the manufacture of refined petroleum products and the transportation and marketing of crude oil and refined petroleum products. The parties stipulated that for the purpose of Section 7 of the Clayton Act the relevant line of commerce was the sale of motor gasoline and that the relevant geographic market was the state of California. At the time of the acquisition Phillips was not selling motor gasoline in California. Tidewater, however, accounted for approximately 6 to 7 percent of total sales in California. Although the district court found that the barriers to entry in the petroleum industry were substantial, it held that Phillips possessed the capability to enter the California market without acquiring Tidewater. Concluding that the industry was already highly concentrated, the district court found the effect of the acquisition may be to substantially lessen competition and, therefore, in violation of Section 7 of the Clayton Act. This decision was subsequently affirmed without opinion by the United States Supreme Court.

The decisions analyzed above clearly provide that important factors to consider when determining the impact on competition of a proposed merger include the market shares of the merging firms, industry trends toward concentration, the degree of concentration within the industry, the history of acquisition of the merging firms and the barriers to entry in the industry. Of course, this list is by no means exclusive. Other factors, depending on their relevancy, may be considered as well. For example, the United States Department of Justice has published "Merger Guidelines." As noted by the district court in *Atlantic Richfield, supra:*

> The purpose of the Guidelines is to insure that the business community, the legal profession and other interested persons are informed of the Department's policy of enforcing Section 7 of the Clayton Act. However, they are in no way binding on the Department in a particular case and the Department is entitled to evaluate each case on the basis of its own facts and the varied factors that must be taken into consideration. (Citations omitted). (Footnote omitted).

297 F. Supp. at 1073. Obviously, such guidelines are not binding on the courts.

It is unquestioned that the petroleum industry is highly concentrated and that it is characterized by substantial barriers to entry. In this regard the court agrees with the following analysis made by the district court in *Atlantic Richfield, supra:*

> The nature and size of gasoline marketing operations are such that enormous expendutures of capital would be necessary to enter the market as a viable competitor. Such costs are almost prohibitive.

In view of the high entry barriers, any increase in concentration and decrease in number of competitors by way of merger would be likely to become permanent. Moreover, the absence of potential new entrants into the market, who usually tend to restrain anti-competitive tendencies, enhances any anti-competive effects which this merger may have. (Footnote omitted).

Id. at 1072.

In all cases which this court has examined the United States Supreme Court has held illegal the consolidation of two vibrant and highly competitive industrial firms, each of which has a substantial share of a significant market. There is little doubt that the combined market shares of Mobil and Marathon in the states of Illinois, Indiana, Michigan, Ohio, Tennessee and Wisconsin would approach or surpass those found to constitute Section 7 violations in *Brown Shoe* and *Pabst*. Accordingly, at this stage of the proceedings, this court holds that Marathon has shown a reasonable probability that it will succeed at trial on the merits of the issue of probable substantial lessening of competition in the states of Illinois, Indiana, Michigan, Ohio, Tennessee and Wisconsin as a result of the proposed merger. Therefore Marathon's motion for a preliminary injunction restraining Mobil from carrying out the proposed acquisition is granted.

IT IS SO ORDERED.

s/ JOHN M. MANOS
United States District Judge

IN THE
DISTRICT COURT OF THE UNITED STATES
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Civil Action No. C81-2193
Judge John M. Manos

MARATHON OIL CO.,
Plaintiff,

vs.

MOBIL CORPORATION, MOBIL OIL CORPORATION,
MERRILL LYNCH, PIERCE, FENNER & SMITH, INC.,
Defendants.

TRANSCRIPT OF PROCEEDINGS HAD BEFORE THE HONORABLE JOHN M. MANOS, JUDGE OF SAID COURT, COMMENCING AT 10:00 A.M., TUESDAY, DECEMBER 1, 1981.

The Court: Mr. Litvack, you asked for a hearing this morning.

Mr. Litvack: Yes, Your Honor, we did.

The Court: Do you want to indicate what you want?

Mr. Litvack: Thank you.

Your Honor, the basic application which I wish to make today goes to and is directed at the Court's decision of November 30, 1981.

I ought to state at the outset, Your Honor, that I am obviously not attempting to reargue that motion or that decision; if ever that be, that is a question for another court and another time.

But I do believe, Your Honor, that there are some matters which ought to be directed and which I would like to direct to this Court's attention at this time.

Specifically, Your Honor, we would like to ask the Court to amend its decision and its order entered today. Although I have not fully read the order in its entirety I'm sufficiently competent I know what it says and the motion is pertinent to it.

And I would like to detail for the Court the nature of the amendment which we are asking. Specifically, Your Honor, we would like to have the order amended so as to continue to bar, if you will, the final consummation of the merger but so as to permit the acquisition of the shares on the following basis: The basis would be, Your Honor, that the Defendant would be ordered to and would hold separate the assets of the marketing and refining operations of Marathon and agree to submit to the Court a plan for the divestiture of those assets, particularly as related to the six states in question.

Let me if I may, Your Honor, just flush that out a little bit so the Court has a grasp of precisely what I am proposing and suggesting.

As the Court well knows, in its November 30th decision, the Court focused primarily upon, indeed exclusively upon gasoline marketing for purposes of this motion and specifically found a probability of success in six particular states with respect to the marketing of the product in those six states.

What we are proposing, Your Honor, and what I think there is precedent for and is appropriate here in the balancing, which I will mention in a moment, is that those six states and the assets and the business associated with it, i.e. the marketing and refining business, be held separate and indeed be divested by Mobil should it acquire control of the company.

The background to this, if you will, or the precedent for this is really fairly abundant. There are a number of situations which are analogous to this and this kind of thing has been done. The reason for seeking it is it is a devise, an appropriate mechanism I suggest for dealing with two concerns, one, the antitrust concerns which the Court has identified as a potential or actual problem in the court's mind, and two, the competing concern that if they were eliminated, that Mobil and the Marathon stockholders

ought to have the benefit of a tender of Mobil for that which would not violate the antitrust laws and which does not pose any legal problem.

This is not a totally novel proposition because this has been done as I indicated at the outset in a number of cases starting if you will with the Brown Shoe case. In Brown Shoe, what the District Court did was order, very preliminarily I might add, before there was any determination as to what markets if any might be offended, et cetera. The District Court ordered a hold separate, i.e. the acquisition of Kinney went ahead but the company in that case was held separate and apart and it stayed that way right through the time the case went to the Supreme Court.

The Court: We don't have a merger here.

Mr. Litvack: We have an acquisition of stock at this juncture.

The Court: In my case we don't have a merger as we did in Brown and Kinney.

Mr. Litvack: I'm not following Your Honor because what we have is an acquisition of stock which if completed--

The Court: I mean I don't have a problem of divestiture, things of that kind; that's what I am saying.

Mr. Litvack: Well, let me be more precise.

In Brown Shoe when the case was brought in the District Court in 1950 whatever, '7 or '8—

The Court: The merger had been completed.

Mr. Litvack: Yes. The government sought a preliminary injunction to block it and the District Court said "No, but I will set up a hold separate." That then stayed in effect all the way until the time it went to the Supreme Court and divestiture was ordered.

What I am saying is hold separate agreement is hold separate the assets, keep them in their entirety have been known in the merger law since at least Brown Shoe. What we are proposing is that we would keep those assets separate and apart subject to two things: One, that during that time, an order would be entered which would preclude and prohibit any type of control, any type of interference, any of the concerns that the Court identified as

potential problems on an irreparable injury basis with respect to the business of Marathon in the marketing and refining operations.

Second thing we would provide is that that business which again is the only area that we are concerned with here, would be divested, would be divested by the defendant promptly. If we did that, we would have removed, as it were the problem that the Court has identified even at this preliminary stage.

There, too, it's really analogous, Your Honor, to what the Court had before it in the ARCO situation where ARCO in fact had an agreement with BP to sell off assets in the northeast, as Your Honor will recall. And in that section of the country, that portion, the Court, the District Court found that indeed it was appropriate in light of that not to find a violation and not to enter into any injunction with respect to that aspect of the case.

Another aspect, as the Court is fully familiar of course, is a different story because there was no such agreement. But here what we are proposing and suggesting is an order which would provide both for the separateness of the assets, pending a divestiture which would occur. At that point, Your Honor, it would seem to us that there is simply no reason under the antitrust laws, at least, why Mobil could not buy the company; the offending part of it would be gone.

I think it's peculiarly appropriate here and I should point out recognizing that the Court is aware of the underlying facts but I should point out that in some ways, maybe it's a function of the antitrust laws, but in some ways it's anomalous that we have six states which represent—well, I try to calculate it but maybe, maybe at most let's say 2 billion dollars of sales, no more than 20 or 25 percent of a company's business would, if you will, be the tail of the dog and hold up the whole acquisition and from our standpoint in trying to deal with that, saying "Okay, here's an area where the Court expressed concern, here's an area where the Court found a reasonable probability of success."

The Court: Off the record.

(Discussion had off the record.)

The Court: Continue.

Mr. Litvak: I don't want to take up Your Honor's time needlessly but let me speak to that if I may and try at least convey to the Court why I think it is an appropriate motion for you to consider and why I think that at this juncture it is appropriate.

I guess there are two reasons: One is practical and one is legal. The practical reason is that while to be sure we are not here on a determination after a full trial on the merits, there is not a final judgment entered in the sense of dispositive of the entire case.

As the Court well knows, and we have said it before, as a practical matter the granting of a preliminary injunction in this case carries with it a situation that goes beyond the normal run of the [mill] preliminary injunction. So as a practical matter, we do have long run concerns. As a legal matter, the reason I believe that Your Honor can consider this, and it's a question of whether you are inclined to, but the reason I believe you can is twofold: one, to the extent that you are talking about or I'm talking about a hold separate order which says that the defendant shall hold these assets separate and hold them in a way which assures no control by Mobil over Marathon assets, these marketing and refining assets, that, Your Honor, is something which as I think the Court knows but has been done in a host of Section Seven cases, private and government, by courts on preliminary injunction motions.

Indeed, that's the time when it is done. It would rarely, if ever—I can't think of any case where that has come up after a trial on the merits. That comes up at the preliminary injunction stage because what the Court is doing typically is balancing in one way or another the probability of success, the harm, et cetera, of going ahead as against the total squelching of the deal and some courts have found in those circumstances—I'm urging that it's appropriate here—that it is sufficient to protect the status quo, to assure against the antitrust violation, to assure against the intrusion, to simply hold those assets separate and protect them in a way. That is, I respectfully suggest, a preliminary injunction or preliminary stage issue, if you will.

The second part of the equation which says "and we would divest those assets" is to be sure, Your Honor, typically and commonly, as the Court noted, a matter which is dealt with after a full trial in terms of divestiture. But it has been dealt with preliminarily, it was in ARCO.

Now, when we get to a procedural question, how does this come before you at this time so to speak, it seems to me that it properly comes before you at this time for two reasons: one, because—and I will amplify upon this in a second—but because the Court's opinion identified certain specific problems, I'm not saying it was mutually exclusive to any other potential problem but it did identify problems which the Court felt sufficient to warrant and justify the issuance of a preliminary injunction.

We are addressing those, it seems to me, and it is appropriate to address them procedurally in the context of a motion to amend or modify, if you will, the injunctive order because the injunctive order can properly still be amended by this Court so as to permit the hold separate aspects and the divestiture of it which would meet and deal with the concerns that the Court identified.

I am mindful of the fact that Your Honor had limited time and was dealing as you said in your opinion with what you were dealing with. But I guess that in the circumstances, I questions I really feel that in the circumstances, where the preliminary injunction is for all practical purposes if it remains in effect the death knell of the offer, that it ought to be viewed in a way which gives us and gives the Court and gives Marathon stockholders the full [panoply] of other alternatives which would otherwise be available which include hold separate and divestiture.

So I think it's appropriate in a motion to amend or alter the judgment at this stage. The question obviously, if the Court, if you agree with that first premise, is whether or not that is desirable and appropriate. I suggest it is. I suggest there is precedent as I outlined, both for the hold separate at the preliminary stage and for the divestiture at least under ARCO at this stage as well. We would request that modification in the order.

The Court: Off the record.

(Discussion had off the record.)

Mr. Strauch: Just briefly, Your Honor. Let me state for the record first that we were advised we were going to be here today on an oral motion to stay your order. We were not advised that the argument was going to be made to modify and to accommodate the hold separate concept.

Nevertheless, I can go forward and respond to Mr. Litvack's arguments.

In the first place, I think this is an argument that should have surfaced much earlier in these proceedings. We know that Mobil was negotiating with the FTC in respect of a hold separate order, did not surface this issue with the Court at a time when the preliminary injunction hearing could have been broadened to include a sensible consideration of that proposal.

Instead, Mobil has in a sense gone for broke and having lost preliminary injunction is now trying to salvage something through a quick oral motion to modify Your Honor's order in a very, very substantial way.

Indeed, I think a reading of the Court's opinion makes it clear that the Court limited itself to a discussion of certain issues which it felt fully justified a preliminary injunction and did not consider whether or not, because of time pressures, there were other claims made by the Plaintiff that would justify the issuance of the order as well and which would obviously go to the legitimacy of the hold separate order of the kind Mr. Litvack has argued for.

Finally, Your Honor, I don't think there is any question but that what a hold separate order of this kind would do serious and irreparable injury to Marathon. We heard to some extent in the hearing we had, perhaps not as much as we would have if this concept of a hold separate order had surfaced earlier, evidence that Marathon already has—

The Court: Would it be in conflict with this Court's decision on the preliminary injunction? Conflict, this hold separate?

Mr. Strauch: I think it would, Your Honor. And Marathon has already suffered to some extent, as Your Honor heard, the loss of employee morale, potential loss of customers, and I don't think

there is any question but that what if Mobil were permitted to acquire Marathon and even if, as a matter of fact, no control was exerted over Marathon—a difficult concept indeed when you have managers who may well end up with certain people as there [sic] bosses—even if that were not the case, I don't think there would be any question but that you would have employees leaving and seeking safer more stable working environment, customers leaving, supplier problems and various matters of that kind.

So for those reasons, we think this belated motion ought to be orerruled.

Mr. Litvack: Your Honor, may I add one thought and make a request?

The thought very simply is to fill out a little bit. When I said marketing and refining assets, I was not unmindful of both of the scope of the Court's opinion, and I myself recognize that the Court addressed itself to gasoline, but did not necessarily bless everything else that was in the case. I understand that.

I wasn't trying to make the hold separate or our proposal nearly so narrow. We have proposed, Your Honor, and I would like to tender a form of an order which encompasses and articulates the kind of thing we are talking about, and the point of the order being that it defines marketing and refining assets.

And what it really comes down to is we are saying that the bulk of the business, if you will, and its marketing and refining includes internals and it includes the pipelines, includes the refineries, includes the distributions, we are saying put that all aside, let's put that all aside and we have a string of things that simply guard against, insure in my judgment, but fairly stated at least guard against any interference, any control by Mobil in this whole wide area of the company's business. There is no question about that.

And I would like to just proffer that to the Court as something which is the form of order or a form of order which would deal with or address or speak to the kind of concern that I am addressing now.

The Court: Off the record.

(Discussion had off the record.)

The Court: Back on the record.

Mr. Birrell: I can understand Your Honor's concern about an order which discusses divestiture which might be uncertain at an uncertain future date. This is not such a situation because the order we are proposing requires us to submit a plan of divestiture within 60 days which must be satisfactory to you.

The fact is that, there is a company which has indicated to us that it is ready, willing and able to buy any or all of the Marathon marketing or refining assets which we might be required to divest.

Thank you.

Mr. Litvack: Your Honor, may I just—

The Court: Thank you. Would you excuse me while I read this?

(Pause.)

The Court: The motion made to the Court to amend its order on a preliminary injunction and to incorporate an order submitted by defense as part of the amendment is denied.

Mr. Litvack: Your Honor, may I raise another matter?

The Court: Pardon?

Mr. Litvack: May I raise another matter?

Mr. Strauch: Your Honor, just may I state something for the record? And that is that this motion for the hold separate was made some time after 10:00 o'clock today in chambers I just wanted the record to show that. I think Mr. Clarke indicated earlier that notice of appeal had become effective when Your Honor filed the order of preliminary injunction which was filed at 9:47.

I think this would present real jurisdictional problems with Your Honor's ruling on the hold separate and I wanted to reflect that.

The Court: What you thought was just because the matter is up on appeal that I loose [sic] jurisdiction. I thought of that and decided I wanted to be more explicit and say I deny the motion.

You have something else?

Mr. Litvack: Yes, Your Honor.

I had initially intended, as Mr. Clarke informed the Court yesterday, to make a motion to stay the preliminary injunction order itself. I'm not really sure not that I have a motion that I care to make in that regard. Assuming for a moment that I read one sentence in this order correct, Your Honor, there is a sentence which says that we are enjoined from, among other things accepting for purchase or payment any shares tendered pursuant to such offer.

I understand that simply to mean that we can not by [buy] the shares.

The Court: Absolutely.

Mr. Litvack: And with that understanding that we are precluded from buying the shares but that is all we are precluded from doing at this juncture, plus of course the obligation to extend the withdrawal period—

The Court: My intent is to knock you out totally.

Mr. Litvack: Well, I better—

The Court: Off the record.

(Discussion had off the record.)

Mr. Litvack: Your Honor, if the injunction would operate as I understand it is intended to [sic] preclude us from any steps in connection with the solicitation of shares or any steps preliminary to the actual acquisition of shares, we would respectfully request that the order be stayed at least to the extent that it precludes any activity except the actual purchase of the shares pending a determination of this matter on appeal.

The Court: Denied.

Mr. Litvack: Thank you, Your Honor.

The Court: So ordered.

Thank you for coming.

Mr. Murphy: Thank you, Your Honor.

(Hearing Adjourned.)

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed December 9, 1981

CASE NO. C81-2193

MARATHON OIL COMPANY,

Plaintiff,

v.

MOBIL CORPORATION, etc., *et al.*,

Defendants.

MEMORANDUM OF OPINION

On November 30, 1981 this court granted Marathon's motion for a preliminary injunction finding the proposed acquisition of Marathon by Mobil [1] created a reasonable probability of a substantial lessening of competition in the marketing of motor gasoline in the states of Illinois, Indiana, Michigan, Ohio, Tennessee and Wisconsin, in violation of Section 7 of the Clayton Act. 15 U.S.C.§ 18. On December 1, 1981 this court issued an Order restraining Mobil from carrying out the proposed acquisition and denied Mobil's motions for a hold separate order and a stay of judgment. On that same date Mobil appealed to the Sixth Circuit Court of Appeals. On December 8, 1981 Mobil filed an application for this court to certify to the Sixth Circuit Court of Appeals that remand of the case would be accepted for the limited consideration of Mobil's motion to modify the preliminary injunction. Mobil asserts that the probability of a substantial lessening of competition found by this court has been eliminated because of an agreement Mobil reached with Amerada Hess Corporation whereby Amerada Hess will take over all of Marathon's transportation, refining and marketing assets should

1. "Mobil," collectively refers to all defendants.

Mobil's tender offer for Marathon be successful. For the reasons which follow Mobil's application requesting certification to the Sixth Circuit Court of Appeals is denied.

When Mobil argued its motion for a hold separate order it also submitted that a plan for divestiture would be proposed within sixty (60) days which, subject to this court's approval, would require Mobil to divest all of Marathon's transportation, refining and marketing assets should Mobil's tender offer be successful. Although Mobil did not divulge the identity of any prospective purchaser of the assets listed above, it did assert that a company existed which was "ready, willing and able to buy any or all of the Marathon's marketing or refining assets which [Mobil] might be required to divest." [2] Thus, the only difference between Mobil's previous motion and that currently before this court is that Mobil has indicated that the purchaser which is "ready, willing and able to buy . . .," is Amerada Hess. This court holds that the proposal made on December 1, 1981 and the current proposal do not, on the basis of Mobil's oral presentation on December 1, 1981 and its present written motion, vary in degree sufficient to impose upon this court the need to reexamine a matter of which it has already once disposed.

Accordingly, Mobil's application for certification to the Sixth Circuit Court of Appeals is denied.

IT IS SO ORDERED.

s/ JOHN M. MANOS

United States District Judge

2. Transcript of Proceedings of December 1, 1981, p. 18.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

Filed December 9, 1981

CASE NO. C81-2193

MARATHON OIL COMPANY,

Plaintiff,

v.

MOBIL CORPORATION, etc., *Et al.*,

Defendants.

ORDER

Pursuant to the Memorandum of Opinion issued in the above-captioned case this date, the defendants' application for certification to the Sixth Circuit Court of Appeals is denied.

IT IS SO ORDERED.

JOHN M. MANOS

United States District Judge

No. 81-3711

United States Court of Appeals

FOR THE SIXTH CIRCUIT

Filed December 23, 1981

MOBIL CORPORATION,

Plaintiff-Appellant,

v.

MARATHON OIL COMPANY, HAROLD D. HOOPMAN, NEIL A. ARMSTRONG, CHARLES H. BARRE, VICTOR G. BEGHINI, JAMES A. D. GEIER, ELMER A. GRAHAM, JACK H. HERRING, W. E. SWALES, RAYMOND C. TOWER, ROBERT G. WINGERTER AND USS, INC.,

Defendants-Appellees.

Before: EDWARDS, Chief Judge; ENGEL and MERRITT, Circuit Judges

ENGEL, Circuit Judge. On October 30, 1981, Mobil Corporation ("Mobil") announced its intention to purchase up to 40 million outstanding common shares of stock in Marathon Oil Company ("Marathon") for $85 per share in cash. Mobil conditioned that purchase upon receipt of at least 30 million shares, just over one-half of the outstanding shares. It further stated its intention to acquire the balance of Marathon by merger following its purchase of those shares.

Marathon directors were concerned about the effects of a merger with Mobil, and they immediately held a board meeting. The directors determined that, together with consideration of another alternatives, they would seek a "white knight"—a more attractive candidate for merger.

On November 1, 1981, Marathon filed an antitrust suit against Mobil in the United States District Court for the Northern District of Ohio, claiming that a merger between Marathon and Mobil would violate section 7 of the Clayton Act, 15 U.S.C. §18. *Marathon Oil Co.* v. *Mobil Corporation,* C-81-2193 (N.D. Ohio). The district court initially granted Marathon's request for a temporary restraining order, which allowed Mobil to receive tenders but precluded it from purchasing shares pending resolution of Marathon's application for a preliminary injunction. The court invited Marathon to continue its search for a white knight.

Negotiations developed between Marathon and several companies. Allied Industries sought to offer to purchase shares on the condition that Marathon buy certain Allied property to finance Allied's subsequent tender offer. Gulf Oil sought an offer conditioned on a stock option for ten million shares. United States Steel Corporation ("U. S. Steel") indicated its interest, and on November 18, 1981, offered what it termed a "final proposal" to be acted upon on that day. By that proposal U. S. Steel offered $125 per share for 30 million shares of Marathon stock, with a plan for a follow-up merger with its subsidiary, U.S.S. Corporation ("USS").

The Marathon directors voted to recommend the U. S. Steel offer to the shareholders on November 18, 1981. USS made its tender offer on November 19, 1981. Marathon, U. S. Steel and USS executed a formal merger agreement on that day. Both USS and Marathon filed the appropriate documents with the Securities Exchange Commission.*

The USS offer, and subsequently the merger agreement, had two significant conditions. First, it required a present, irrevocable option to purchase ten million authorized but unissued shares

* In a very belated amicus brief, Local Unions of the United Steelworkers, et al., contend that U. S. Steel should be employing its assets and credit to modernize its steel plants rather than for purchasing an oil company. Whatever merit there may be to this connection, no party to this litigation presented this issue in the District Court. Even more important, to our knowledge, Congress has not adopted any statute which would authorize the federal courts to prohibit on this ground the acquisition contemplated by U. S. Steel.

of Marathon common stock for $90 per share ("stock option"). These shares equalled [sic] approximately 17% of Marathon's outstanding shares. Next, it required an option to purchase Marathon's 48% interest in oil and mineral rights in the Yates Field for $2.8 billion. ("Yates Field option"). The latter option could be exercised only if USS's offer did not succeed and if a third party gained control of Marathon. Thus, in effect, a potential competing tender offeror could not acquire Yates field upon a merger with Marathon.

The value of Yates field to Marathon and to potential buyers is significant; Marathon has referred to the field as its "crown jewel." As Judge Kinneary has indicated, it is viewed as an enormous resource:

> One of the world's most remarkable oil fields is the Yates field in Pecos county (of the Permian basin province of West Texas). Producing from an unusually prolific and highly permeable reservoir rock, under natural hydraulic pressure, the potential production of 313 wells distributed over 17,000 acres in this field was in 1929 estimated to be in excess of 5 million bbl. per day. This was more than the total daily production of all United States fields; however, production has been drastically curtailed.

Mobil Corporation v. *Marathon Oil Company, et al.*, C-2-81-1402 at 27 (S. D. Ohio December 7, 1981), *Quoting* L. C. Uren, *Petroleum Production Engineering* (1950) quoted at p. 5 of the First Boston Corporation, *Yates Field: Another Look* (August 14, 1980).

Judge Kinneary observed the unique characteristics of the Yates field:

> [E]ven though the Yates Field has been producing oil for more than fifty years, petroleum engineers consider the field to be in the intermediate state of depletion, that is, they expect the field to continue producing oil for ninety years; in that there are between 3 and 3.5 billion barrels of oil still in place, the Yates Field holds the promise of providing additional reserves of oil that could be recovered; and

> cumulative production, as of the date of the report, accounted for only 39 percent of the conservatively estimated recoverable reserves of 2.0 billion barrels. . . .
>
> [One expert] estimated total recoverable reserves of 565 million barrels . . . [although 150 million barrels] were potential reserves and their recovery might not occur.

Mobil Corp. v. *Marathon Co.*, C-2-81-1402 at 27-28.

The importance of Yates to a potential tender offeror is illustrated by the fact that both Gulf Oil and Allied indicated that they would propose a tender offer only upon assurances that they would have an option to buy Marathon's interest in the Yates Field. Such requests are a recent, but recurring phenomenon in connection with tender offers. *See, e.g., Conoco, Inc.* v. *Mobil Oil Corp.*, No. 81-4787 (S.D. N.Y. Aug. 4, 1981).

Following this agreement, Mobil filed suit in the United States District Court for the Southern District of Ohio, seeking to enjoin the exercise of the options and any purchase of shares in accordance with the tender offer. Named as defendants were Marathon, its directors, and USS. Mobil alleged that the options granted to USS served as a "lockup" arrangement to defeat any competitive offers of Mobil or third parties, thereby constituting a "manipulative" practice "in connection with a tender offer," in violation of section 14(e) of the Williams Act, 15 U.S.C. § 78n(e), and rules promulgated thereunder. It claimed further that Marathon failed to disclose material information regarding the purpose of the options to its shareholders, also in violation of section 14(e). It also complained of various violations of state law: Marathon acted in breach of its fiduciary duties; it violated Ohio Rev. Code § 1701.76 by selling "all or substantially all" of its assets without shareholder approval;[1] and it effected transactions outside the scope of any legitimate corporate purpose.

On November 24, 1981, Judge Kinneary granted in part Mobil's motion for a temporary restraining order, prohibiting

1. Ohio Rev. Code § 1701.76 provides in part:

(footnote continues)

Marathon and USS from taking any action in connection with the tender offer or the Yates Field option agreement. Mobil announced a new tender offer on November 25, 1981, offering to purchase at least 30 million common shares of Marathon at $126 per share in cash, conditioned on a finding that the USS stock option and the Yates Field option were invalid. Mobil reserved a right to waive these conditions and thereafter limit its purchase to less than fifty percent of the shares outstanding. Mobil again indicated its intention to merge with Marathon if the tender offer were successful. Mobil proposed to purchase remaining shares with Mobil debentures having a value of $90 in cash.

Following that offer, Judge Kinneary considered Mobil's application for a preliminary injunction. In an opinion dated December 7, 1981, he denied a preliminary injunction on the grounds that the test enunciated in *Mason County Medical Ass'n* v. *Knebel*, 563 F.2d 256 (6th Cir. 1977), had not been satisfied. Because there appears to be a substantial likelihood that Mobil will succeed on its claim that execution of the Yates Field and stock options are "manipulative acts or practices, in connection with (a) tender offer" in violation of section 14(e), 15 U.S.C.

(A) A lease, sale, exchange, transfer, or other disposition of all or substantially all, the assets, with or without the good will, or a corporation, if not made in the usual and regular course of its business, may be made upon such terms and for such consideration, which may consist, in whole or in part of money or other property of any description, including shares or other securities or promissory obligations of any other corporation, domestic or foreign, as may be authorized: (1) by the directors, either before or after authorization by the shareholders as required in this section; and (2) at a meeting of the shareholders held for such purpose, by the affirmative vote of the holders of shares entitling them to exercise two-thirds of the voting power of the corporation on such proposal, or if the articles so provide or permit, by the affirmative vote of a greater or lesser proportion, but not less than a majority, of such voting power, an by such affirmative vote of the holders of shares of any particular class as is required by the articles. Notice of the meeting of the shareholders whether or not entitled to vote thereat. Such notice shall be accompanied by a copy or summary of the terms of such transaction.

§ 78n(e),[2] we conclude that a consideration of the *Mason County* criteria required the grant of preliminary injunctive relief, and accordingly, we reverse.

I.

As Judge Kinneary stated, the factors to consider in evaluating whether a preliminary injunction will issue have been outlined in *Mason County Medical Ass'n* v. *Knebel*, 563 F.2d 256, 261 (6th Cir. 1977):

1. Whether the plaintiff has shown a strong or substantial likelihood or probability of success on the merits;
2. Whether the plaintiff has shown irreparable injury;
3. Whether the issuance of a preliminary injunction would cause substantial harm to others;
4. Whether the public interest would be served by issuing the preliminary injunction.

Judge Kinneary found that Mobil made a showing with regard to the last three factors to support a preliminary injunction. He stated:

> Mobil has made a sufficient showing that irreparable harm may be incurred if preliminary injunctive relief is denied. Even should Mobil be successful in acquiring more than 50 percent of the equity interest of Marathon through direct competitive bidding against USS, Inc., the Yates Field option agreement between USS, Inc. and Marathon could be exercised by USS, Inc., thereby effectively destroying any chance that Mobil might have to acquire Marathon with its Yates Field interest intact. Further, the present Marathon shareholders also stand to suffer irreparable injury if, as alleged, the defendants have failed to disclose material facts regarding the package of agreements between Marathon and USS, Inc., in that they will

2. This finding makes unnecessary for purposes of this appeal any consideration of whether Marathon acted in violation of state law or violated disclosure requirements of section 14 of the Williams Act, 15 U.S.C. § 78n(e), and rules promulgated thereunder.

be forced to make irrevocable investment decisions without the benefit of adequate information. Finally, if interim injunctive relief were denied and Mobil later prevailed at trial on its claim under the Williams Act, formulating an adequate remedy at that time, after the effectuation of a USS, Inc.—Marathon merger, might be difficult or impossible.

* * * *

The Court also concludes that the issuance of a preliminary injunction would not unduly cause substantial harm to others. Defendant USS, Inc. asserts that the issuance of the injunction would prejudice USS, Inc. in the minds of Marathon shareholders, and discourage them from tendering shares to USS, Inc., to the detriment of both the shareholders and USS, Inc. Defendant USS, Inc.'s Memorandum in Opposition to Preliminary Injunction, at 34-35. The Court finds this argument tenous, and concludes that test number three creates no obstacle to the issuance of interim injunctive relief.

Finally, the Court believes that, if it should find that plaintiff has shown a strong or substantial likelihod of success on the merits, the issuance of a preliminary injunction would be in the public interest. There is a clear and overriding public interest in having influential business enterprises comply with legislation and legal principles designed to protect investors in the marketplace.

To summarize, the Court concludes that a preliminary injunction would be appropriate if plaintiff can show a strong or substantial liikelihood of success on the merits of its claims.

Mobil Corp. v. *Marathon, et al.*, C-2-81-1402 at 32-34 (footnotes omitted).

Judge Kinneary nonetheless denied the motion for preliminary injunction because he determined that Mobil had not demonstrated a "substantial likelihood of success on the merits." He found that the disclosures were in accord with section 14(e) requirements. He found further that the state law claims were not substantial in light of Marathon's good faith in connection

with the tender offer negotiations. Judge Kinneary also rejected the argument that execution of the Yates Field and stock options could be manipulative acts in violation of section 14(e). We disagree with his finding, and we now turn to a consideration of that question.

II.

Although the issue has not been raised by either party, out of an abundance of caution we believe it necessary to determine whether Mobil has a private cause of action for injunctive relief under section 14(e) of the Williams Act. *See California* v. *Sierra Club*, 101 S.Ct. 1775, 1781 (1981). In *Piper* v. *Chris-Craft, Inc.*, 430 U.S. 1 (1977), the Supreme Court in an opinion by Chief Justice Burger held that a defeated tender offeror (Chris-Craft) did not have a "private cause of action" for damages against the succesful bidder (Bangor Punta) and the target company (Piper). The Court, however, carefully limited its consideration to whether money damages could be recovered. It expressly reserved the question of "whether as a general proposition a suit in equity for injunctive relief . . . would lie in favor of a tender offeror under . . . § 14(e) . . . ." *Id.* at 47 n.33. This open question has not been resolved by the Supreme Court or by this circuit, although other courts faced with the issue have found that such a cause of action exists.[3] After an examination of the *Piper* analysis, a consideration of the distinctions between damage actions and injunctive actions, and a recognition of the special problems associated with the dynamics of tender offer battles, we agree with these courts and hold that a tender offeror has an implied cause of action under the Williams Act to obtain timely injunctive relief for violations of section 14(e).

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3. *See Weeks Dredging & Contracting Inc.* v. *American Dredging Co.*, 451 F. Supp. 468 (E.D. Pa. 1978); *Humana, Inc.* v. *American Medicorp., Inc.*, 445 F.Supp. 613 (S.D.N.Y. 1977). *Cf. Crane Co.* v. *Harsco Corp.*, 511 F.Supp. 294 (D.Del. 1981) (a tender offeror has an implied cause of action for an injunction under section 13(e) of the Williams Act.)

Mobil argues that it is maintaining this action because of its status as a Marathon shareholder. Because Mobil is a hostile tender offeror, we do not agree that Mobil may assert its claims under the Williams Act as a shareholder. In *Piper*, the Supreme Court rejected the notion that a defeated tender offeror could assert injury using shareholder status. Chief Justice Burger stated:

> It is clear . . . that Chris-Craft has not asserted standing under § 14(e) as a Piper shareholder. The reason is not hard to divine. As a tender offeror actively engaged in competing for Piper stock, Chris-Craft was not in the posture of a target shareholder confronted with the decision of whether to tender or retain its stock. Consequently, Chris-Craft could scarcely have alleged a need for disclosures mandated by the Williams Act. In short, the fact that Chris-Craft necessarily acquired Piper stock as a means of taking over Piper adds nothing to its § 14(e) standing arguments.

430 U.S. at 35-36. Similarly, Mobil is not trying to sell its Marathon stock. It has no interest, as an ordinary shareholder would, in trying to raise the price of Marathon stock. Thus, Mobil cannot assert that it was injured as a shareholder by the Marathon-USS options. Accordingly, the issue now squarely before us is whether Mobil, *as a tender offeror*, may maintain an action for an injunction.

Whether Congress intended a cause of action to be implied from legislation is a question of statutory construction. *Transamerica Mortgage Advisers, Inc.* v. *Lewis*, 444 U.S. 11 (1979). In *Piper*, the Court examined the statutory scheme and legislative history in order to identify the legislative purpose of the Williams Act and concluded that "the sole purpose of the Williams Act was the protection of investors who are confronted with a tender offeror." *Piper, supra*, 430 U.S. at 35. With that purpose in mind, the Court proceeded to evaluate the Williams Act under the four-part test set forth in *Cort* v. *Ash*, 422 U.S. 66 (1975). Therefore, in the instant case, we must also examine the *Cort*

factors to determine whether Congress in the Williams Act intended to grant an implied cause of action for injunctive relief to a tender offeror.

The first *Cort* factor is whether the plaintiff is "one of the class for whose *especial benefit the statute was enacted.*" *Id.* at 78 (emphasis in original). As a tender offeror, Mobil would not appear to be the intended beneficiary of the Act. We believe, however, that we can look to the practical realities of this type of action and determine that a cause of action is necessary to aid the shareholders of Marathon and to prevent violations of the Williams Act. A preliminary injunction against manipulative practices would be the only means of preserving the free, informed choice of shareholders that the Williams Act was designed to protect. As the Supreme Court acknowledged in Piper, "in corporate control contests the stage of preliminary injunctive relief, rather than post-contest lawsuits, 'is the time when relief can best be given.'" *Piper* v. *Chris Craft, supra,* 430 U. S. at 42. In a tender offer battle, events occur with explosive speed and require immediate response by a party seeking to enjoin the unlawful conduct. Issues such as incomplete disclosure and manipulative practices can only be effectively spotted and argued by parties with complete knowledge of the target, its business, and others in the industry. The tender offeror has frequently made intensive investigations before deciding to commence its offer and may often be the only party with enough knowledge and awareness to identify nondisclosure or manipualtive practices in time to obtain a preliminary injunction.

The second factor in *Cort* is whether there was "any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one.["] *Cort* v. *Ash. supra,* 422 U. S. at 78. In *Piper,* the Court concluded that legislative history of the Williams Act showed:

> [T]he narrow intent to curb the unregulated activities of tender offerors. The expression of this purpose, which pervades the legislative history, negates the claim that tender offerors were intended to have additional weapons in the form of an implied cause of action *for damages,*

> particularly if a *private damages claim* confers no advantage on the expressly protected class of shareholder-offerees, a matter we discuss later.

Piper v. *Chris-Craft*, 430 U. S. at 38. (emphasis added).

On the other hand, an injunctive action by a tender offeror has significantly different effects than a damage action. First, clear benefit is derived by the shareholders of the target. An injunction would protect the Marathon shareholders from making their decisions whether to sell without full information. As such, it furthers the purpose of the Williams Act. Second, an injunctive action does not tip the balance in favor of one tender offeror. This type of action serves merely to prevent the manipulativve practices at which the Williams Act was aimed without deterring management or competing offerors from engaging in the battle.

The third *Cort* factor requires a determination that the existence of a private remedy is "consistent with the underlying purpose of the legislative scheme." *Cort* v. *Ash, supra*, 422 U. S. at 78. In *Piper*, the Court concluded:

> Although it is correct to say that the $36 million damages award indirectly benefits those Piper shareholders who became Chris-Craft shareholders when they accepted Chris-Craft's exchange offer, it is equally true that the damages award injuries those Piper shareholders who exchanged their shares for Bangor Punta's stock and who, as Bangor Punta shareholders, would necessarily bear a large part of the burden of any judgment against Bangor Punta. The class sought to be protected by the Williams Act are the shareholders of the *target* corporation; hence it can hardly be said that their interests as a class are served by a judgment in favor of Chris-Craft and against Bangor Punta.

Piper v. *Chris-Craft*, 430 U. S. at 39 (emphasis in original). The injunctive action in the instant case, however, would have very different effects. It would protect *all* Marathon shareholders by preventing management or competing tender offerors from failing to disclose fully or from using manipulative tactics. Because of the unique ability of Mobil to act quickly while armed

with information necessary to prove any section 14(e) violations, this injunctive action may often be the only means to provide adequate assurance that Marathon's shareholders have a fully informed, free choice. Moreover, because no monetary loss is threatened for one who inadvertently violates the Williams Act, an action for an injunction does not pose the danger of deterring future offers.

In the fourth and final *Cort* factor, we must determine whether "the cause of action [is] one traditionally relegated to state law." *Cort* v. *Ash, supra,* 422 U. S. at 78.

In *Piper,* the Supreme Court found that a tender offeror had a common law cause of action for damages under principles of interference with a prospective commercial advantage. *Piper* v. *Chris-Craft,* 420 U.S. at 40-41. While such an action may be an effective common law alternative for a damage action, we do not believe that the common law has traditionally provided an injunctive remedy that would effectively protect Marathon shareholders from nondisclosure or manipulation by the parties in the bidding. Judge Kinneary in this case concluded that Mobil could assert an action on behalf of the Marathon shareholders under the common law principles of breach of fiduciary duty. This common law action, however, is by no means adequate to serve as a substitute for an action under section 14(e). As we find in section III of this opinion, manipulation under the Williams Act cannot be justified by the good faith performance of fiduciary duties. It follows, therefore, that Mobil's cause of action for an injunction under section 14(e) does not have an effective counterpart under the traditional common law principles.

Thus, we conclude after an examination of the four factors of *Cort* v. *Ash* that Mobil has an implied cause of action under section 14(e) to obtain an injunction against Marathon and USS for failure to make proper disclosure and employment of manipulative practices. In reaching this conclusion regarding Congress' intent, we are mindful that as a general rule, the Supreme Court has cautioned against the implication of private causes of action

under the securities laws,[4] but we also recognize four special circumstances of this case. First, the action is one for a preliminary injunction which, as noted by Chief Justice Burger in *Piper*, is at the stage "when relief can best be given." 430 U.S. at 42. Second, the inherent nature of tender offer litigation requires a plaintiff to possess an extreme amount of data and information in order to challenge successfully Williams Act violations during the short time frame at hand. Third, the relief sought by Mobil is injunctive. Because a court may structure its remedy on a case-by-case basis, this satisfies the concern of the Court in *Piper* "that shareholder protection . . . can more directly be achieved with other, less drastic means more closely tailored to the congressional goal underlying the Willians Act." 430 U.S. at 40. Finally, although it is apparent from our decision in *Marathon Oil Co.* v. *Mobil Corp.*, 81-3704 (6th Cir. December , 1981), decided concurrently herewith, that Mobil has suffered a further setback in its effort to acquire control of Marathon, its offer is still outstanding and its capability of ultimately prevailing in the companion litigation has not at this stage been irrevocably foreclosed. Its continuing interest in the controversy assures a full and fair development of the issue in the action.

III.

Section 14(e) provides:

> *It shall be unlawful for any person* to make any untrue statement of a material fact or omit to state any material fact necessary in order to make the statements made, in

4. In *Touche Ross* v. *Redwine*, 442 U.S. 560 (1979), it was held that there is no cause of action for damages in favor of the customers of a stock broker against an accounting firm which had submitted information required under Seciton 17(a) of Securities Exchange Act of 1934, 15 U.S.C. § 78(q)(a)(1970 ed.), information claimed to be misleading. In denying relief, the Supreme Court found that the primary purpose of Section 17(a) is not to benefit the customers of the stock brokers, but rather merely to provide the government with information. The Court further emphasized that Section 17(a) does not prescribe conduct as illegal. The facts are, however, clearly inapposite. Unlike Section 17(a), Section 14(e) and the Williams Act generally are directly designed to protect shareholders as a class. Even more important, Section 14(e) does prescribe conduct, conduct which is the subject of this litigation.

> the light of the circumstances under which they are made, not misleading, *or to engage in any fraudulent, deceptive, or manipulative act or practices, in connection with any tender offer* or request or invitation for tenders, or any solicitation of security holders in opposition to or in favor of any such offer, request, or invitation.

15 U.S.C § 78n(e) (emphasis added). Mobil's claim has been that the Yates Field and stock options granted by Marathon to USS, the wholly-owned subsidiary of U.S. Steel, constitute a "manipulative act or practice" in connection with the USS tender offer of November 19, 1981, in violation of section 14(e). The district court found no substantial likelihood of success by Mobil on the merits of this claim, holding that it "amounts to no more than a claim that the Marathon directors acted unfairly and breached their fiduciary [duty] to Marathon and its shareholders," and as such fails to state a cause of action under section 14(e). The district court relied on *Santa Fe Industries, Inc.* v. *Green*, 430 U.S. 462 (1977), in which the Supreme Court held that a mere breach of corporate fiduciary duty does not violate section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j. We believe the district court's interpretation of the *Santa Fe* case and its characterization of Mobil's claim as nothing more than a breach of fiduciary duty were erroneous.

Santa Fe involved a claim under section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j, and S.E.C. Rule 10b-5, 17 C.F.R. § 240.106-5 (1976). Section 10(b) concerns the sale and purchase of securities rather than tender offers, but its anti-manipulation language is the language of section 14(e), and provides:

> It shall be unlawful for any person, directly or indirectly, by the use of any means or instrumentality of interstate commerce or of the mails, or of any facility of any national securities exchange—
>
> To use or employ, in connection with the purchase or sale of any security registered on a national securities exchange or any security not so registered, any manipulative or deceptive device or contrivance in contravention of

> such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors.

Santa Fe held that a mere allegation of unfair treatment of minority shareholders, corporate mismanagement, or breach of corporate fiduciary duty by majority shareholders or corporate directors does not state a cause of action under section 10(b), and particularly that such conduct, standing alone, does not constitute a "manipulative device or contrivance" under the statute. 430 U.S. at 474-77.

Although Mobil alleges a breach of fiduciary duty by the Marathon directors, as one of its pendent state law claims, this claim is not the only basis upon which it complains. Although we offer no opinion regarding the merits of the fiduciary duty claim, we are of the opinion that the Yates Field option and the stock option individually and together are "manipulative" as that term is used in section 14(e).

The term "manipulative" is not defined in either the Securities Exchange Act or the Williams Act. *See, e.g.*, 15 U.S.C. § 78(c). "Manipulation" in securities markets can take many forms, *see, e.g.*, 15 U.S.C. §§ 78i, 78j (proscribing certain forms of manipulation), but the Supreme Court has recently indicated that manipulation is an affecting of the market for, or price of, securites by *artificial* means, i.e., means unrelated to the natural forces of supply and demand.

> Use of the word "manipulative" is especially significant. It is and was virtually a term of art when used in conncection with securities markets. It connotes intentional or willful conduct designed to deceive or defraud investors by controlling or artificially affecting the price of securities.

Ernst & Ernst v. *Hochfelder, 425 U.S. 185,199 (1976). (footnote omitted)*

> *"Manipulation" is "virtually a term of art when used in connection with securities markets." Ernst & Ernst,* 425 U.S., at 199. The term refers generally to practices, such

> as wash sales, matched orders, or rigged prices, that are intended to mislead investors by artificially affecting market activity.

Santa Fe Industries, Inc. v. *Green, 430 U.S. 462, 476 (1977).*

In our view, it is difficult to conceive of a more effective and manupulative device than the "lock-up" options employed here, options which not only artificially affect, but for all practical purposes completely block, normal healthy market activity and, in fact, and could be construed as expressly designed solely for that purpose.

The types of options demanded and recieved by USS in this case are relatively new to the world of tender offer takeover contests, and we are unaware of any Supreme Court or Court of Appeals case confronting the question of whether these particular techniques are "manipulative" within the meaning of section 14(e) of the Williams Act. However, courts have recognized that the term "manipulative" must remain flexible in the face of new techniques which artificially affect securities markets. "No doubt Congress meant to prohibit the full range of ingenious devices that might be used to manipulate securities prices." *Santa Fe Industries, Inc.* v. *Green, supra,* at 477 (Section 10(b)). A similar observation was made regarding the Commodity Exchange Act, 7 U.S.C. §§ 9, 13, which prohibits manipulation of commodities market prices:

> The methods and techniques of manipulation are limited only by the ingenuity of man. The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand.

Cargill, Inc. v. *Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971), *cert. denied,* 406 U.S. 932 (1972)

We are of the opinion that under the circumstances of this particular case, Mobil has shown a sufficient likelihood of ultimately establishing that the Yates Field option and the stock option had the effect of creating an artificial price ceiling in the

tender offer market for Marathon common shares, and that the options therefore are "manipulative acts or practices" in connection with a tender offer in violation of section 14(e) of the Williams Act.

There is ample evidence in the record to support Judge Kinneary's finding that Marathon's Yates Field interest is a unique and significant asset. We believe there is also sufficient evidence in the record to indicate that this asset is a very important attraction to Mobil and other potential bidders for control of Marathon. The Yates Field option which USS demanded and received in connection with its tender offer of $125 per share greatly dampens the demand by Mobil and other potential bidders in the tender offer market, because a successful takeover by any bidder other than USS will give USS the right to exercise its option and purchase the Yates Field interest for $2.8 billion. This presents a significant threat to other bidders that even if they gain control of Marathon they will lose the Yates Field oil reserves.

The district court found that the $2.8 billion which Marathon would receive from USS in exchange for the Yates Field oil reserves is a fair price, but there was evidence that the field might be worth as much as $3.639 billion. We point this out not to disturb the district court's finding, but to illustrate that potential tender offerors may value the Yates Field reserves at a higher figure than $2.8 billion, especially in today's world of ever-depleting oil supplies and the volatile, unpredictable nature of oil prices over the long term. Oil companies and other companies like USS seeking to invest in the oil industry may find that long-term oil reserves, not cash or other assets, will best insure long-term profits. As a result, we cannot say that Mobil and other potential bidders for control of Marathon would not be willing to make tender offers reflecting a Yates Field vaulation far greater than $2.8 billion, were it not for the Yates Field option which USS possesses. Only the open market contemplated by the Act provides a means to measure its value.

The Yates Field option is exercisable if, and only if, control of Marathon is obtained by a third party. The only effect of this

option can be to deter Mobil and any other potential tender offerors from competing with USS in an auction for control of Marathon. Others cannot compete on a par with USS; its bid of $125 per share thus amounts to an artificial ceiling on the value Marathon shareholders can receive for their shares. Therefore, there is a substantial likelihood that the option is manipulative under section 14(e) of the William Act.

The particular facts before us also indicate that the stock option that USS demanded and received in connection with its tender offer prevents all others from competing on a par with USS for control of Marathon. In our opinion, the stock option was large enough in this takeover contest to serve as an artificial and significant deterrent to competitive bidding for a contolling block of Marathon shares.

The stock option gave USS the right to purchase 10 million authorized but unissued shares of Marathon for $90 per share. USS could exercise its option at any time during the takeover contest and acquire 10 million newly issued shares; presently there are 58,685,906 Marathon common shares outstanding. The original Mobil tender offer was for 40 million shares at a price of $85 per share. The USS tender offer was for 30 million shares at $125 per share. An estimate prepared by the First Boston Corporation, Marathon's investment banker, calculated that because of the stock option, it would cost Mobil (or any other outside bidder seeking 40 million shares of Marathon) 1.1 to 1.2 billion additional dollars to match the USS tender offer. A chart contained in page six of the first Boston report discloses that every dollar raise in the bid by USS would cost USS $30 million, while each such dollar raise would cost Mobil $47 million. App. 718. Harold D. Hoopman, president and chief executive officer of Marathon testified about the stock option and the First Boston chart, which the Marathon directors had before them when they decided to grant the stock option to USS on November 18, 1981, as follows:

> Q. That would be 1.2 billion of additional cost to Mobil if they attempted to match US Steel, isn't that true?

A. That's true.

Q. Would you agree that the fact as it relates to Mobil, or a third party, of giving this option in terms of these costs would mean that any third party or Mobil would have to put up a very significant additional amount of money in order to make a tender offer?

A. That's correct.

Q. Was that discussed at the meeting?

A. Yes.

Q. It was discussed, I assume, on the basis that if we can make this fly, this is one way to make it much more expensive for Mobil to come to the same price; isn't that true?

A. That's true.

Q. Further, you discussed this would be a deterent not only to Mobil, but to other third parties, wouldn't it?

A. That's right.

App. 201-202.

The size and price of the stock option, together with the fact that it was granted to USS, a tender offeror, prevented all others from competing on a par with USS for a controlling block of Marathon shares, and tipped the scales decidedly in favor of USS. In our opinion, the stock option artificially and significantly discouraged competitive bidding for the Marathon stock.

The Yates Field option and the stock option, both individually and in combination, have the effect of circumventing the natural forces of market demand in this tender offer contest. Were this contest a straight price-per-share auction, tender offers well in excess of the USS offer of $125 per share may have been forthcoming. Of course, Mobil itself has offered $126 per share, conditional on the judicial removal of the options. Our task under the Williams Act is not to speculate about what price the Marathon shareholders might have been offered if the natural market forces existed in this tender offer contest, but rather to enforce the mandate of section 14(e) against manipulation of the market. The purpose of the Williams Act, protection of the

target shareholders, requires that Mobil and any other interested bidder be permitted an equal opportunity to compete in the marketplace and persuade the Marathon shareholders to sell their shares to them.

The defendants argue that section 14(e) requires full disclosure and nothing more. They point to the following language in the Supreme Court's opinion in *Santa Fe*, concerning section 10(b):

> [T]he Court repeatedly has described the "fundamental purpose" of the [Securities Exchange] Act as implementing a "philosophy of full disclosure"; once full and fair disclosure has occurred, the fairness of the terms of the transaction is at most a tangential concern of the statute.

430 U.S. at 477-78. The defendants read too much into this language. *Santa Fe* held that mere allegations of unfairness and breach of fiduciary duty by majority shareholders to the minority did not violate section 10(b). It did not find that nondisclosure was the only ground upon which to base a 10(b) claim. Instead, the Court expressly made a factual determination that "the conduct . . . alleged in the complaint was not 'manipulative' . . . " 430 U.S. at 476. *Santa Fe* thus cannot be taken to mean that conduct that falls within the special meaning of the term "manipulation . . . " is legal so long as it is fully disclosed. "[N]ondisclosure is usually essential to the success of a manipulative scheme," *id.* at 477, but this case illustrates that disclosure alone does not always mean that there is no manipulation. It may be that the Marathon shareholders in this case have now been fully informed that their management granted USS the Yates Field option and the stock option. They may now understand fully how these options deter any tender offers higher than $125 per share. Yet, they have had no real alternative to accepting the USS offer, because Mobil's offer of $126 is conditional upon the invalidity of the options, and there is and could be no other comparable tender offer as long as the "lockup" options remain in effect. The artificial ceiling on the price of their shares at $125 is manipulation to which they must submit whether it is

disclosed to them or not, since to not tender their shares to USS would be to risk being relegated to the "back end" of USS's takeover proposal and only receive $90 per share.

In short, to find compliance with section 14(e) solely by the full disclosure of a manipulative device as a *fait accompli* would be to read the "manipulative acts and practices" language completely out of the Williams Act.

The district court found that the Marathon directors' decision on November 18, 1981 to accept USS's proposed merger agreement, including the Yates Field and stock options, was not a breach of fiduciary duty. The district court's holding was based in part on its finding the Marathon's directors were faced with a non-negotiable package proposal from USS which had to be accepted or rejected in less than a day, and which they accepted because they felt it was the only way they could get the USS $125 bid for their shareholders. (Mobil's bid at that time was $85.) In holding today that the option agreements were manipulative under section 14(e) of the Williams Act, we need not disturb the district court's finding of good faith and loyalty by the Marathon directors. Section 14(e) prohibits manipulation by "*any* person", and thereby covers the conduct of USS in demanding and obtaining the options, as well as any manipulative conduct by the Marathon directors. The Williams Act protects the target shareholders regardless of who did the manipulating.

In conclusion, it is apparent to us that the particular options granted to USS by Marathon under the circumstances of this tender offer contest constitute "manipulative acts" in connection with the tender offer, violative of section 14(e) of the Williams Act. In so ruling, we do not purport to define a rule of decision for all claims of manipulation under the Williams Act, or indeed for all forms of options which might be claimed to "lock up" takeover battles or otherwise discourage competing tender offers.

RELIEF

By the terms of its tender offer, USS gave Marathon shareholders a time in which to tender their shares and in turn promised

that it would not withdraw its tender offer before that time. These dates have been extended. It is apparent from the record that a substantial majority of shareholders have agreed with the trial judge that the tender offer was reasonable and that they desired to accept it. It would be anomalous, indeed, if after our holding that USS had engaged in a manipulative practices under § 14(e), it was by the very illegality of its conduct able to gain an unjustified benefit by the untimely withdrawal of the offer after its conduct may have dissuaded others from entering into the field as competing tender offerers. In this respect, the fashioning of appropriate equitable relief requires, and we so order, that the tender offer of USS of $125 per share be kept open for a reasonable time but free of the inhibiting and unlawful impact of the two options which it extracted from the Marathon board as a condition of its agreement.[1] Therefore, considerations of equity require that there be a time sufficient for adequate notice to Marathon shareholders under the Williams Act and to give shareholders an opportunity to withdraw their tenders of stock already made. The period of time likewise should be sufficient to permit the acceptance of any competing tender offers by Marathon from others who may now have an interest in doing so, being uninhibited by the coercive impact of the two options which have been declared violative of § 14(e).

Reversed and remanded to the District Court for further proceedings consistent with this opinion. The mandate shall issue forthwith.

---

1. By this order we do not deprive USS of any benefit of its proposed bargain, except the illegal option advantages. These, of course, do not diminish the value of Marathon to USS—if USS proves to be the successful bidder.

Re: Mobil Corporation v.
Marathon Oil Company
No. 81-3711

MERRITT, Circuit Judge, dissenting. Although I do not disagree that some defensive moves by a tender offerer may be found to be manipulative acts under the Williams Act, my view is that Mobil's Williams Act case is moot in light of our disposition of the antitrust case. Mobil's ability to raise and maintain a Williams Act challenge to the option arrangement necessarily rests on the assumption that Mobil can, in fact, make a tender offer. Having by injunctive order decided that it is legally impossible for Mobil to make such an offer, Mobil's ability to raise the Williams Act claim has disappeared and the issues are moot in a lawsuit between Mobil and Marathon.

Mobil's Williams Act claims to market neutrality are moot because it can assert its claim only as a tender offerer. Although Mobil is also a shareholder of Marathon, Mobil cannot, consistently with the purposes of the Williams Act, sue in the posture of a target shareholder or as the representative of stockholders when its real interest is as a tender offerer. The Supreme Court in *Piper* v. *Chris-Craft Industries*, 430 U.S. 1, 35 (1977), rejected the theory that an actively competing tender offerer may sue, qua shareholder, for violation of § 14(e). A rival tender offerer competing for a target shareholder confronted with the decision of whether to tender or retain its stock. *Piper, supra at* 35.

Because the 14(e) issue is moot, we need not reach the issue left open in *Piper*, whether [§] 14(e) confers on rival tender offerers standing to seek injunctive relief. And we need not define the meaning of manipulation under the Williams Act.

This is not a case in which the Williams Act issue "evades review." The manipulation issues may be raised by a stockholder and perhaps by a competing tender offerer—although we need not decide this issue—who is not legally disabled from bidding. In this case, the interests of the stockholders are not represented, and I do not think we should decide the issue.

I would dismiss this appeal.

LISTING OF SUBSIDIARIES AND AFFILIATES OF PETITIONERS PURSUANT TO SUPREME COURT RULE 28.1*

AB Djurgardsberg
Abu Dhabi Petroleum Company Limited
Adria-Wien Pipeline Gesellschaft m.b.H.
AIMCO (ALPHA) Shipping Company
AIMCO (OMEGA) Shipping Company Ltd.
Aircraft Fuel Supply B.V.
Airtankdienst Koln
AK Chemie GmbH & Co. KG
Akauma Rekisei Kogyo Kabushiki Kaisha
Alexandroupolis Petroleum Installation S.A.
Allied Asphalts Limited
Alpa Alet Ve Dayanikli Tuketim Mamulleri Pazarlama A.S.
Altona Petrochemical Company Limited
Alyeska Ammenn GmbH Pipeline Service Company
Ankara Gaz Satis Anonim Sirketi
Arabian American Oil Company
Arabian International Maritime Company Limited
Arabian International Maritime Company
The Arabian Petroleum Supply Company (S.A.)
Aral Aktiengesellschaft
A/S Fjellvegen
A/S Kongens Plass I
A/S Moretral
The Associated Octel Company Limited
Associated Octel Company (Plant) Limited
ATAS—Anadolu Tasfiyehanesi Anonim Sirketi
Atlas Sahara S.A.
Australasian Petroleum Company Proprietary Limited
Australian Synthetic Rubber Company Limited
Autobahn-Betriebe Gesellschaft m.b.H.
Aviation Fuel Services Limited
Aygaz Anomim Sirketi
B.V. Beheersmaatschappij MOBEM
Basrah Petroleum Company Limited
Bataan Refining Corporation
Bayerische Erdgasleitung GmbH

* Mobil Oil Corporation is a wholly-owned subsidiary of Mobil Corporation.

Bayerische Mineral-Industrie A.G. Benoil S.A.
Bostadsrattsforeningen Basunen, Malmo
Bostadsrattsforeningen Forarsatet, Orby
Bostadsrattsforeningen Silverskatten, Trelleborg
Bostadsrattsforeningen Skepparegarden, Norrkoping
Brazos Heights Housing Incorporated
Brussels Airfuels Service S.C.
Buffalo River Improvement Corporation
Canner's Steam Company, Incorporated
Cansulex Limited
Canyon Reef Carriers, Inc.
Cartoenvases Valencia, S.A.
Carton de Colombia, S.A.
Carton de Venezuela, S.A.
Cartones Nationales, S.A.
Celmisia Shipping Corporation
Celulosa y Papel de Columbia, S.A.
Central African Petroleum Refineries (Pvt) Limited
Central Kagaku Kabushiki Kaisha
Cercera S.A.
Changi Airport Fuel Hydrant Installation Pte. Ltd.
Chuo Nenryo Gas Kabushiki Kaisha
Colombianos Distribuidores de Combustibles, S.A. (CODI)
Colonial Pipeline Company
Combustibles Colmeraver
Comet-Brennstoffdienst GmbH
Comex-Seal France S.A.
Comex-Seal Guernsey Ltd.
Comex-Seal Limited
Comex-Seal U.K. Limited
Comex-Seal U.S. Corporation
Compagnie Africaine de Transport Cameroun
Compagnie D'Entreposage Communautaire
Compagnie Immobiliere (Comimmo)
Compagnie Regionale de Distribution de Produits Petroliers-C.O.R.E. Dis.
Compagnie Rhenane de Raffinage
Compagnie Senegalaise des Lubrifiants (C.S.L.)
Compania Colombiana de Empaques Bates, SSA
Compania de Lubricants de Chile Limitada (Copec-Mobil Ltda.)
Compania Mexicana de Especialidades Industriales, S.A. de C.V.

Consortium Raymond Duez
Constructora Calle 70, S.A.
Cook Inlet Pipe Line Company
CORCOP
Corrugadora de Carton, S.A.
C.R.C. Lyon Chauffage
CRCP
Croager Bros. (1962) Limited
Cyprus Petroleum Refinery Limited
D. Muhlenbruch GmbH
D. Muhlenbruch GmbH & Co. KG
Dai Nipon Jushi K.K.
De. Ba. Deposito di Bari S.p.A.
Depot Petrolier de Mourepiane
Depot Petrolier du Gresivaudan
Depot de Petrole Cotiers
Depots Petroliers de La Corse (DPLC)
Deutsche Mobil Oil Exploration Ireland Ltd.
Deutsche Pentosin-Werke GmbH
Deutsche Transalpine Oelleitung GmbH
Dicomi S.r.l.
Dixie Pipeline Company
Drivmedelscentralen AB
Dukhan Services Company
East Japan Oil Development Company Ltd.
Eastern Lease Company Ltd.
Emoleum (Asphalts) Limited
Entrepot Petrolier de Chambery
Entrepot Petrolier de Dijon
Entrepot Petrolier de Mulhouse (E.P.M.)
Entrepot Petrolier de Nancy
Entreprise Jean Lefebvre
Erdgas-Verkaufs-Gesellschaft mbH
Erdoel-Lagergesellschaft mbH
Erodel-Raffinerie Neustadt GmbH & Co. oHG
Erdoelbetrieb Reitbrook
Erdoelraffinerie Gesellschaft mbH in Liquidation
Establissments Bouthenet
Establissements Nicol and Cie
Faavang Autoverksted A/S
FACEL
Felix Oil Company
Filtroleo-Sociedade Portuguesa de Filtros Lda.

Filtros De Costa Rica S.A.
Finsbury Printing Limited
Fountain Garage (Alfreton Road) Ltd.
Fountain Garage (East Park) Ltd.
Fountain Garage (Halesowen) Ltd.
Fountain Garage (Leyton) Ltd.
Fountain Garage (Meadowhead) Ltd.
Fountain Garage (Mercury) Ltd.
Fountain Garage (Newbury Park) Ltd.
Fountain Garage (Sale) Ltd.
Fountain Garage (Stirchley) Ltd.
Fountain Garage (Wednesbury) Ltd.
Frome-Broken Hill Company Proprietary Limited
Fruehmesser mineraloelhandels GmbH & Co. KG
Fruemesser GmbH
Fuso Operations Kabushiki Kaisha
Futuro Enterprises (Christchurch) Ltd.
Futuro Homes (N.Z.) Ltd.
Gas Aletleri Anonim Sirketi
Geomines-Caen
Geovexin
Germ Lubricants Limited
Ghana Bunkering Services Limited
Goteborgs Branslesortering AB
Groupement Immobilier Petrolier G.I.P.
Groupement Petrolier Aviation G.P.A.
Groupement Petrolier De Brest (GPB)
Handelmaatschappij Hugenholtz & Co. B.V.
H. E. Oils Limited
Heizoel-Handelsgesellschaft mbH
Hellas Gas Storage Company S.A.
Highgate Associates, Ltd.
Home Counties Petroleum Products Limited
Hormoz Petroleum Company
Hydranten-Betriebs-Gesellschaft, Flughafen Frankfurt
Imperial Gas Co. of P.R., Inc.
Industria de Carbon del Valle Cauca, S.A.
Iranian Oil Participants Limited
Iranian Oil Services (Holdings) Limited
Iranian Oil Services Limited
Iraq Petroleum Company, Limited
Iraq Petroleum Pensions Limited
Iraq Petroleum Transport Company Limited

Island Exploration Company Proprietary Limited
Istanbul Petrol ve Makine Yaglari Limited Sirketi
Japan Airport Fueling Service Co. Limited
Japan Solar Energy Co., Ltd.
J.E.C.O.P.
K. Allan & Company Limited
K. K. Sankyo Plastics
K. K. Toresen
Kanto Kyguns Sekiyu Hambai K. K.
Kanto Oil Pipeline Co., Ltd.
Kawasaki Kygnus Sekiyu Hambai Kabushiki Kaisha
Keihin Kygnus Sekiyu Hambai Kabushiki Kaisha
Keiyo Sea-Berth Company, Limited
Kettleman North Dome Association
Klaus Koehn GmbH
Klaus Koehn GmbH & Co. Mineraloel KG
Kobe Port Service Kabushiki Kaisha
Kurt Ammenn GmbH & Co. K.G.
Kygnus Ekika Kabushiki Kaisha
Kygnus Kosan Kabushiki Kaisha
Kygnus Sekiyu Kabushiki Kaisha
Kyokyto Petroleum Services Overseas, Ltd.
Kyokuto Sekiyu Kogyo Kabushiki Kaisha
Les Nouveaux Comptoirs Petroliers
Les Supermarches De Cote D'Ivoire
Lubricantes del Sur, S.A.
Marceaux & Cie
Matco Tankers (U.K.) Limited
Maury Manufacturing Company, Inc.
Mediterranean Refining Company
Meentzen & Franke GmbH & Co.
Michael Beecham Limited
Mobil Ami, S.A.
Mobil Atlas Sociedad Anonima de Capital Variable
Mobil Chemie Belgie N.V. and Mobil Chimie Belge S.A.
Mobil-Comercio, Industria e Servicos Ltda.
Mobil Gaz-Mobil Petrol Gazlari. Anonim Sirketi
Mobil Korea Lube Oil Industries Inc.
Mobil Motor Rest AG
Mobil Oil Angola, SARL
Mobil Oil Cameroun
Mobil Oil Cote d'Ivoire
Mobil Oil Dahomey

Mobil Oil Djibouti, S.A.
Mobil Oil Francaise
Mobil Oil Gabon
Mobil Oil Ghana Limited
Mobil Oil Haute Volta
Mobil Oil Holdings S.A.
Mobil Oil Mali
Mobil Oil Maroc
Mobil Oil Mauritanie
Mobil Oil Niger
Mobil Oil Nigeria Limited
Mobil Oil Nord-Africaine
Mobil Oil Philippines Inc.
Mobil Oil Portuguesa, S.A.R.L.
Mobil Oil Rwanda-Burundi (S.A.R.L.)
Mobil Oil Senegal
Mobil Oil Tchad
Mobil Oil Togo
Mobilrex
Mobil Tunisie
Mobil Tyco Solar Energy Corporation
Modern Buildings Membranes Ltd.
Molinos de Carton y Papel, S.A.
Morem
Mosul Petroleum Company Limited
Motel Rest SA
Motrate Products Limited
Mt. Marrow Blue Metal Quarries Pty.
Ndola Oil Storage Company Limited
Near East Development Corporation
New Zealand Refining Company Limited, The
New Zealand Synthetic Fuels Corp. Ltd.
Nichimo Sekiyu Seisei Kabushiki Kaisha
Nippon Unicar Company Limited
Norddeutsche Erdgas-Aufbereitungs GmbH
Nordic Storage Company Ltd.
Nottingham Gas Limited
N.V. Rotterdam-Rijn Pijpleiding Maatschappij
N.V. Socony-Standard-Vacuum Oil Company
Occidental de Empaques, Ltda.
Octel Associates
Octel S.A.
Oil Kol (Proprietary) Limited

Oil Service Company of Iran (Private Company)
Oldenburgische Erdoel Gesellschaft mit beschrankter Haftung
Olympic Pipe Line Company
Osage Pipe Line Company
P.T. Arun Natural Gas Liquefaction Company
P.T. Stanvac Indonesia
Paloma Pipeline Company
Pars Investment Corporation
Pembalta Gas System No. 1 Ltd.
Pembalta Gas System No. 3 Ltd.
Pembalta Gas System No. 4 Ltd.
Pembalta Gas System No. 5 Ltd.
Pembalta Gas System No. 6 Ltd.
Perretti Petroli S.p.A.
Petrocab
Petrogas Processing Ltd.
Petroleum Development (Cyprus) Limited
Petroleum Refineries (Australia) Proprietary Limited
Petroleum Services (Middle East) Limited
Petroleum Tankship Company Inc.
Petromin Lubricating Oil Company
Petromin Lubricating Oil Refining Company
Pipe-Lines de la Pallice
Plegadizos para la Industria S.A.
Poly Oil Chimie (P.O.C.)
Qatar Petroleum Company Limited
Qualbank, Inc.
Ragosine Oil Company Limited
Rainbow Pipe Line Company, Ltd.
Randhurst Corporation
Reforestadora Andina, S.A.
Reforestadora del Cauca, S.A.
Rhodes Petroleum Installation S.A.
Rivers Court Estates, Limited
Roc Lubricants Limited
Roc Lubricants (OCL) Limited
Rohel-Aufsuchungs Gesellschaft mbH
Ruhrgas Aktiengesellschaft
S&M Pipeline Limited
S.A. Mas & Cie
S.A.M. Lebreton
Samarco (Alpha) Shipping Company
Samarco (Beta) Shipping Company

Sanwa Kasei Kogyo Kabushiki Kaisha
SARL Garage Pineau
Sarni S.p.A.
Saudi Arabian Maritime Company
Saudi Can Company, Ltd., The
Saudi Chemical Industries Company Limited
Saudi Maritime Company Ltd.
Saudi Yanbu Petrochemical Company
Schubert Kommanditgesellschaft
S.C.I. Du Fonds Du Val
Seal Participants (Holdings) Limited
Segher de Mexico, S.A. de C.V.
Seibu Kygnus Sekiyu Hambai Kabushiki Kaisha
SENERCO
Seram Societa per Azioni (S.p.A.)
Sierra Leone Petroleum Refining Company Limited, The
R. Simonnet & CIE
Socalor
Sociedade Portugal Marrocos SARL
Societa Italiana per l'Oleodotto Transalpino, S.p.A.
Societe Africaine de Raffinage
Societe Agicole Des Entreprises Petrolieres (S.A.D.E.P.)
Societe Anonyme Etablissments Nicol and Cie
Societe Belge de Transport par Pipeline S.A.
Societe Camerounaise des Depots Petroliers (S.C.D.P.)
Societe Camerounaise Equatoriale De Fabrication De Lubrifiants "S.C.E.F.L."
Societe Civile de Mustapha
Societe Civile Immobiliere Courcelles-Etoile
Societe Civile Immobiliere de Construction de 34 Avenue du General Leclerc a Boissy-St-Leger
Societe Civile Immobiliere de Construction "La Residence Brune"
Societe Civile Immobiliere du 10 Bd. de la Republique A La Garenne-Colombes
Societe Civile Immobiliere Kleber-Etoile
Societe Civile Immobiliere La Fontaine Saint Lucien
Societe Civile Immobiliere Mobil
Societe Dahomeenne d'Entreposage de Produits Petroliers
Societe d'Armement Fluvial et Maritime "SOFLUMAR"
Societe de Construction & de Gestion CB 12
Societe de Distribution Castelroussine (SODICA)
Societe de Gaz D'Oceanic (SOGADOC)

Societe de Manutention de Carburants Aviation (S.M.C.A.)
Societe de Manutention de Carburants Aviation Dakar-Yoff
Societe de Manutention de Carburants Aviation de Tahiti (SOMCAT)
Societe de Maperialx d' Etancheite Pour Le Entreprises (Meple)
Societe d'Entreposage de Bobo-Dioulasso (S.E.B.)
Societe d'Entroposage d'Hydocarbures de Bingo (SEHBI)
Societe d'Entreposage de San Pedro (SESP)
Societe d'Entreposage Petrolier au Burundi
Societe de Renovation D'Emballages Metalliques (Rem)
Societe d'Habitations a Loyer Modere de la Seine Maritime
Societe des Bitumes et Cut-Backs du Cameroun
Societe des Etablissements Goux
Societe Des Huiles Lemahieu
Societe de Pipe-Line Sud-Europeen
Societe Francaise Stoner-Mudge
Societe Gabonaise d'Entreposage de Produits Petroliers
Societe Gabonaise de Raffinage
Societe Industrielle des Asphaltes et Petroles de Lattaquie (Syrie) S.A.
Societe Ivoirienne de Fabrication de Lubrifiants (S.I.F.A.L.)
Societe Ivoirienne de Raffinage
Societe Mauritanienne d'Entreposage de produits Petroliers
Societe Nationale de Raffinage (Sonara)
Societe Nouvelle Raffinerie Meridionale De Ceresines (RMC)
Societe Novodis
Societe Pizo De Formulation De Lubrifiants (PIZOLUB)
Societe Regionale De Produits Petroliers
Societe Tahitienne de Depots Petroliers
Societe Tchadienne d'Entreposage de Produits Petroliers
Societe Togolaise d'Entreposage (STE)
SOMODIP
Sonarep (South Africa) (Proprietary) Limited
SONEX
South African Oil Refinery (Proprietary) Limited
South Saskatchewan Pipe Line Company
South West Africa Road Binders (Proprietary) Limited
Statfjord Transport A.S.
Station-Service Lunes
Sydney Metropolitan Pipeline Pty. Ltd.
Syria Petroleum Company Limited
T.R. Miller Mill Company, Inc.

Tanklagergesellschaft Koln-Bonn
Tecklenburg GmbH
Tecklenburg GmbH & Co. Energiebedarf K.G.
Texoma Pipe Line Company
Thailand Lubricant Prducts Limited
Thailand Solvent Products, Ltd.
Thomas Moscrop (Lion Oils) Limited
Thums Long Beach Company
Toa Nenryo Kogyo Kabushiki Kaisha
Tohko Plastics Co., Ltd.
Tonen Energy International Corp.
Tonen Sekiyu Kagaku Kabushiki Kaisha
Tonen Tanker Kabushiki Kaisha
Tonen Technology Kabushiki Kaisha
Total Centrafricaine de Gestion (TOCAGES)
Toulouse - Distribution Produits Petroliers
Toyoshina Film Co., Ltd.
Transalpine Finance Holdings S.A.
Transalpine Oelleitung in Oesterreich Gessellschaft m.b.H.
Trans-Arabian Pipe Line Company
Transgas Umschlags-Lager-Und Transport Gesellschaft MbH
Turkish Petroleum Company Limited
Twifo Oil Plantations Ltd.
UBAG Unterflur Betankungsanlage Flughafen Zurich
Union Grafica, S.A.
United Kingdom Oil Pipelines Limited
VOSACEC, S.P.A.
W.A.G. Pipeline Pty. Ltd.
Wako Kasei Kabushiki Kaisha
Wakohjushi Kabushiki Kaisha
Werner Weidemann Mineraloelvertrieb G.m.b.H.
West Shore Pipe Line Company
Wolverine Pipe Line Company
Wyco pipe Line Company
Zaire Mobil Oil
Zaire Services Des Entreprises Petrolieres

Opposition

Office - Supreme Court, U.S.
FILED
JAN 28 1982
ALEXANDER L. STEVAS,
CLERK

No. 81-1213

In The Supreme Court of the United States

OCTOBER TERM, 1981

MOBIL CORPORATION and
MOBIL OIL CORPORATION, *Petitioners*
– against –
MARATHON OIL COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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Cleveland, Ohio 44115
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Cleveland, Ohio 44115
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January 28, 1982

QUESTION PRESENTED

Whether the court of appeals erred in finding that the district court did not abuse its discretion in rejecting a proposed hold separate and partial divestiture order, offered without supporting evidence only after entry of a preliminary injunction enjoining a proposed acquisition which the district court had found would probably violate the antitrust laws, when uncontroverted evidence adduced at a four-day hearing demonstrated that the order would not have remedied the violation.

TABLE OF CONTENTS

	Page
Opinions Below	1
Statement of the Case	2
Argument	5
1. The Question Presented by Mobil Is Not Raised by the Record	5
2. The Question Presented by Mobil Is Fact-Intensive, Would Involve Review of an Act of Discretion Which Was Twice Unanimously Affirmed and Arises in a Unique Setting	7
Conclusion	10
Appendix	1a
Opinion and Order of the Court of Appeals, January 4, 1982	1a

TABLE OF AUTHORITIES

CASES

Federal's Inc. v. Edmonton Investment Co., 555 F.2d 577, 583 (6th Cir. 1977) 9

First National Bank v. Hirsch, 535 F.2d 343 (6th Cir. 1976) 4

FTC v. Exxon Corp., 636 F.2d 1336, 1343-44 (D.C. Cir. 1980) 7

Graver Tank & Manufacturing Co. v. Linde Air Products Co., 336 U.S. 271, 275 (1949) 8

Pargas, Inc. v. Empire Gas Corp., 423 F. Supp. 199, 246-49 (D. Md.), *aff'd*, 546 F.2d 25 (4th Cir. 1976) 7

	Page
Southern Power Co. v. North Carolina Public Service Co., 263 U.S. 508, 509 (1924)	8
United States v. Atlantic Richfield Co., 297 F. Supp. 1075 (S.D.N.Y. 1969)	7, 8
United States v. Culbro Corp., 436 F. Supp. 746, 754-56 (S.D.N.Y. 1977)	7
United States v. Johnston, 268 U.S. 220, 227 (1925)	8
United States v. Swift & Co., 286 U.S. 106, 119 (1932)	8, 9
United States v. White Consolidated Industries, Inc., 323 F. Supp. 1397, 1399 (N.D. Ohio 1971)	7
Walker v. Bank of America National Trust & Savings Association, 268 F.2d 16, 25 (9th Cir.), *cert. denied*, 361 U.S. 903 (1959)	6

STATUTES AND RULES

15 U.S.C. § 18	2
15 U.S.C. § 26	2
Rule 59(e), Federal Rules of Civil Procedure	5
Rule 62(c), Federal Rules of Civil Procedure	6

TEXTS

7 Moore's Federal Practice § 62.05 (1979)	6
11 C. Wright & A. Miller, *Federal Practice and Procedure* § 2904 (1973)	6

MISCELLANEOUS

The Cleveland Plain Dealer, Nov. 13, 1981 at B19	2
N.Y. Times, Nov. 13, 1981 at 33 (Midwest ed.)	2

In The
Supreme Court of the United States
OCTOBER TERM, 1981

No. 81-1213

MOBIL CORPORATION and
MOBIL OIL CORPORATION, *Petitioners*

– against –

MARATHON OIL COMPANY, *Respondent*

ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinions below are set out in the Appendix to the Petition (hereinafter "Pet. App."), except for the as yet unreported Opinion and Order of the court of appeals of January 4, 1982 which appears in the Appendix hereto beginning at page 1a.

STATEMENT OF THE CASE

On October 30, 1981 Mobil Corporation and Mobil Oil Corporation (collectively, "Mobil") commenced a cash tender offer for Marathon Oil Company ("Marathon").[1] On November 1, 1981 Marathon filed a verified complaint in the District Court for the Northern District of Ohio alleging that the proposed acquisition would violate section 7 of the Clayton Act, 15 U.S.C. § 18, and seeking preliminary and permanent injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26.

Following intensive discovery, a four day evidentiary hearing on Marathon's motion for a preliminary injunction was held. While the primary focus of the hearing was on the alleged antitrust violations, media reports[2] that Mobil was attempting to negotiate a hold separate arrangement with the Federal Trade Commission staff induced Marathon both to brief (JA 1508-13),[3] and to present substantial evidence in support of (JA 1675-84), the propositions that nothing short of injunctive relief would adequately protect the public interest and that a hold separate arrangement would have serious anticompetitive effects. Mobil made no attempt to controvert this evidence, did not propose a hold separate order at the hearing and did not respond to Marathon's discussion of the issue in either its

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[1] The listing of Marathon's subsidiaries and affiliates required by Supreme Court Rule 28.1 is attached as Exhibit C to Marathon's January 5, 1982 Memorandum in Opposition to Mobil's Emergency Application to Preserve the Status Quo Pending Consideration of Certiorari to the Sixth Circuit. That listing is currently accurate.

[2] *See* N.Y. Times, Nov. 13, 1981 at 33 (Midwest ed.); The Cleveland Plain Dealer, Nov. 13, 1981 at B19.

[3] Citations in this form refer to pages in the Joint Appendix of the parties on appeal in the Sixth Circuit from the judgment of the District Court for the Northern District of Ohio, which is now lodged with this Court.

pre- or post-hearing briefs filed with the district court (*compare, e.g.*, JA 1508-13, 1196-1200 *with* JA 1352-1410).

In a decision rendered November 30, 1981 the district court found that "the consolidation of [these] two vibrant and highly competitive industrial firms, each of which has a substantial share of a significant market," would likely violate section 7 of the Clayton Act (Pet. App. A-28). The court's decision rested primarily on the substantial overlap in gasoline marketing found in six separate midwestern states (Pet. App. A-22 to A-23, A-28). The court also noted, however, that other antitrust concerns were raised by the proposed takeover which it did not then need to resolve (Pet. App. A-17 n.7). Mobil filed its notice of appeal in the afternoon of November 30 (JA 51).

On the morning of December 1, after entry of the Order of Preliminary Injunction (JA 49-50), Mobil made an oral motion to the district court "to amend its . . . order entered today" (Pet. App. A-30) to permit Mobil to acquire Marathon shares but to require Mobil to submit for the court's approval within sixty days a plan for the divestiture of Marathon's domestic marketing and refining assets. Under the form of amendment tendered (JA 1433-37), Mobil would retain all Marathon's crude oil reserves, both foreign and domestic. In making its motion, Mobil represented to the district court that there was a company which was "ready, willing and able" to buy these assets (Pet. App. A-37), but Mobil chose not to reveal the identity of that purchaser at that time, nor did it offer any evidence in support of its motion (*See* Pet. App. A-29 to A-38). The district court denied the motion on December 1 (Pet. App. A-37).

On December 4, 1981 Mobil filed its brief on appeal in the court of appeals, assigning as error the district court's denial of its December 1 oral motion. On December 7 Mobil filed in the court of appeals an Emergency Motion for Leave to Proceed in the District Court (JA

2358-64), in order to present a "Heads of Agreement" entered into between Mobil and Amerada Hess Corporation (JA 2376-89), which provided that it was Amerada Hess which would buy Marathan's domestic refining and marketing assets if a "definitive agreement in the form normally employed" could be negotiated (JA 2389).

On December 8 Mobil filed in the district court an Application for Certificate of the District Court (JA 2352-57) seeking certification that the district court was willing to consider the effect of the Heads of Agreement on its Order of Preliminary Injunction should the court of appeals grant the requested remand.[4] The district court held a hearing on Mobil's application that same day (JA 2390-420), and denied it on December 9, holding that disclosure of the name of the "ready, willing and able" buyer was not a change of circumstances "sufficient to impose upon this court the need to reexamine a matter of which it has already once disposed" (Pet. App. A-39 to A-40).

The court of appeals conducted its own thorough review of the evidence and in an opinion dated December 23, 1981 affirmed both the issuance of the preliminary injunction and the subsequent discretionary denial of "Mobil's proposed 'hold separate order' which was orally advanced" (Pet. App. A-9).

On December 29, 1981 Mobil filed its Petition for a Writ of Certiorari in this Court. Mobil's emergency application for extraordinary relief pending consideration of certiorari was denied by the Sixth Circuit on January 4, 1982, in an opinion reaffirming the previous rejection of "Mobil's belated proposal of a 'hold separate order'" (3a):

> We now reiterate our prime concern is the preservation of some competition in this market which a dis-

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[4] Such certification is regarded by the Sixth Circuit as a prerequisite to remand. *First National Bank v. Hirsch*, 535 F.2d 343 (6th Cir. 1976).

> membering of Marathon could damage. Nothing that Mobil has proposed in these belated filings would serve to protect the marketplace from the elimination, in times of shortage, of price competition provided by independent dealers previously supplied by Marathon. We are not convinced that Mobil's "hold separate" proposal which would cut Marathon's refining and marketing operations from its oil field production and reserves would cure the probable antitrust violations. It would leave Marathon's refining and marketing operations at the mercy of basic suppliers (like Mobil) and make it more vulnerable to possible monopoly pressures previously described in our opinion of December 23, 1981 (3a).

On January 6, 1982 Chief Justice Burger denied a similar application.

ARGUMENT

1. The Question Presented by Mobil Is Not Raised by the Record.

Mobil tenders as the question presented whether a court, after having issued a preliminary injunction on antitrust grounds, may thereafter refuse to consider a divestiture plan that would avoid the alleged antitrust violations. That question is not raised by the record in this case because the district court *did* consider Mobil's hold separate and partial divestiture proposal. That detailed proposal (JA 1433-37) was presented to the court by oral motion "to amend its decision and its order entered today" (Pet. App. A-30), and was presumably made under Rule 59(e) of the Federal Rules of Civil Procedure. A hearing on that December 1 motion was held. While Mobil neither presented nor sought to present evidence with respect to the effect of its proposal, its counsel was fully heard (*see* Pet. App. A-29 to A-38). At the end of the hearing, the court

denied the motion on the merits (Pet. App. A-37). This exercise of discretion, twice unanimously affirmed by the court of appeals, presents no question appropriate for the intervention of this Court. *See Walker v. Bank of America National Trust & Savings Association*, 268 F.2d 16, 25 (9th Cir.), *cert. denied*, 361 U. S. 903 (1959).

When Mobil's application for a certificate was heard on December 8, the district court did not refuse to consider the "Heads of Agreement" between Mobil and Amerada Hess. Instead, the court evaluated that document and concluded on December 9 that it represented the same proposal which the court had already considered and rejected, save for identification of the buyer (Pet. App. A-40). Accordingly, the court held that it had not been presented with a "var[iation] in degree sufficient to impose upon [the] court the need to reexamine a matter of which it ha[d] already once disposed" (*ibid.*)[5].

Again, this proper exercise of discretion presents no question of general applicability, particularly when it is recognized that Mobil relied solely on Rule 62(c) of the Federal Rules of Civil Procedure as authority for the certificate which it sought on December 8 (JA 2393-95), a rule the function of which is the maintenance of the *status quo* pending appeal, 7 Moore's Federal Practice § 62.05 (1979); 11 C. Wright & A. Miller, *Federal Practice and*

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[5] Whether there is jurisdiction in this Court to consider the district court's December 9 denial of the requested certificate is extremely doubtful. That denial was not itself appealed and probably was not appealable. The Sixth Circuit did not rule in terms on Mobil's Emergency Motion for Leave to Proceed in the District Court. Even if it can be assumed that the Sixth Circuit passed on that motion and denied it *sub silentio*, the denial of such a motion would not seem to be a final judgment over which this Court would have jurisdiction. Further, once appellate proceedings which a party wished to interrupt for remand to the district court are terminated, any issue raised by denial of the motion for remand would seem to be moot.

Procedure § 2904 (1973). Far from preserving the *status quo*, however, Mobil's underlying motion was designed to terminate the existence of the plaintiff in this action and thereafter to dismember it. Denial of the motion was a proper exercise of discretion. The record simply does not reveal any "refus[al] to consider" (*see* Pet. at 7) Mobil's partial divestiture proposal.

2. The Question Presented by Mobil Is Fact-Intensive, Would Involve Review of an Act of Discretion Which Was Twice Unanimously Affirmed and Arises in a Unique Setting.

Once the probability that an acquisition will violate the antitrust laws has been established on a hearing for a preliminary injunction,[6] the trial court faces the discretionary question whether to issue a preliminary injunction or to authorize a hold separate order or a partial divestiture order if one is offered. Such decisions are fact-intensive. In some situations courts consider that there is justification for a hold separate order, *e.g.*, *United States v. Culbro Corp.*, 436 F. Supp. 746, 754-56 (S.D.N.Y. 1977), or a partial divestiture order, *e.g.*, *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1075 (S.D.N.Y. 1969). In others they do not. *E.g.*, *United States v. White Consolidated Industries, Inc.*, 323 F. Supp. 1397, 1399 (N.D. Ohio 1971); *Pargas, Inc. v. Empire Gas Corp.*, 423 F. Supp. 199, 246-49 (D.Md.), *aff'd*, 546 F.2d 25 (4th Cir. 1976). The standards to be applied, however, have been thoroughly canvassed and are not the subject of any dispute needing resolution by this Court. *See, e.g.*, *FTC v. Exxon Corp.*, 636 F.2d 1336, 1343-44 (D.C. Cir. 1980). This Court does not ordinarily sit to review such fact-intensive, discretionary decisions when the applicable standards are not in

[6] Mobil does not seek review of that finding here.

dispute. *Graver Tank & Manufacturing Co. v. Linde Air Products Co.*, 336 U.S. 271, 275 (1949); *United States v. Johnston*, 268 U.S. 220, 227 (1925); *Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924).

Moreover, the procedural circumstances surrounding Mobil's presentation of its hold separate and partial divestiture plan are unique, and so a decision by this Court could have little general applicability. Unlike the situation in *United States v. Atlantic Richfield Co.*, 297 F. Supp. 1075 (S.D.N.Y. 1969), relied on by Mobil in this Court (Pet.8) and below (compare JA 2401-02 with JA 2433-34), at the time of Mobil's oral motion and the hearing on that motion the preliminary injunction here had already issued. According to *United States v. Swift & Co.*, 286 U.S. 106, 119 (1932), the principal case relied on by Mobil in this Court (Pet. at 8, 10), the burden was therefore on *Mobil* to prove that the antitrust "dangers, once substantial, have become attenuated to a shadow."

Factual questions presented by Mobil's motion included:

- whether the proposed hold separate and partial divestiture plan would cure the probable antitrust violations found;
- whether it would cure the other antitrust violations raised which the court had not found it necessary to address;
- whether a dismembered Marathon, with all of its crude oil reserves lost to Mobil, would be a viable and competitive source of motor gasoline to price-competitive independent marketers; and
- whether the acquisition of Marathon's marketing assets by the "ready, willing and able" partner which Mobil had selected would raise independent antitrust problems.

Mobil adduced no evidence as to any of these questions at the preliminary injunction hearing.[7] It did not offer to adduce evidence as to any of them at either the hearing conducted on December 1 or on December 8. Indeed, on December 8 Mobil suggested only that the court might wish to consider such additional evidence "as *Marathon* may want to put in" (JA 2406, emphasis supplied; *see also* JA 2404). Mobil thus did not even offer to establish that its hold separate and partial divestiture proposal "would avoid the alleged antitrust violations upon which the injunction was premised," as its question presented assumes (*see* Pet. at i) and as *Swift* requires. Mobil's failure to meet or even to offer to meet its burden was fatal to its motion, and for that reason too its question presented is not raised by the record in this case.

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[7] Mobil's counsel made very clear that the decision not to adduce evidence on these questions was a "conscious decision" made because of Mobil's litigation strategy "that one does not address oneself . . . to hold separates in the middle of a hearing" (JA 2417, 2400; *see also* 2405). Cf. *Federal's Inc. v. Edmonton Investment Co.*, 555 F.2d 577, 583 (6th Cir. 1977).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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No. 81-3704

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

MARATHON OIL COMPANY, *Plaintiff-Appellee,* vs. MOBIL CORPORATION, MOBIL OIL CORPORATION, et al., *Defendants-Appellants.*	**Opinion and Order** **[Filed January 4, 1982]**

Before: EDWARDS, Chief Judge, ENGEL and MERRITT, Circuit Judges.

EDWARDS, Chief Judge. We respond in this opinion and order to the emergency motion filed in this court December 31, 1981, by Mobil Corporation and Mobil Oil Corporation to add United States Steel Corporation (Steel) to this action as a party and to enjoin Steel and its subsidiaries from acquiring any shares of the stock of Marathon Oil Company until completion of proceedings in the Supreme Court of the United States on Mobil's petition for a writ of certiorari.

Initially, if we assumed that this action was an appeal from the denial of a similar motion filed before and denied by Judge John M. Manos in the United States District Court for the Northern District of Ohio on December 31, 1981, we would deny same on procedural grounds for failure to comply with the Rules of Appellate Procedure.

In view, however, of the extraordinary and special circumstances confronting the parties (and the courts), we consider the said motion as if it were a petition for injunction, which is filed in this court under 28 U.S.C.

§ 1651 (1976), or as a motion under Rule 40 FED. R. APP. P. for rehearing of this court's opinion dated December 23, 1981. So considered, and assuming that the basic issues now sought to be presented are properly before us, we believe that they were answered succinctly in the Conclusion of this court's opinion of December 23, 1981, as follows:

> We also conclude that the District Court did not abuse its discretion in rejecting Mobil's proposed 'hold separate order' which was orally advanced after the preliminary injunction was granted.
>
> We hold that the findings of fact entered by Judge Manos are not clearly erroneous. Generally, but without endorsing all of his reasoning, we accept his conclusions of law. This record shows that Marathon has been a substantial supplier of independent gasoline marketers (60% of all motor gasoline sold by Marathon is eventually resold at retail prices below Mobil's. *E.g., Marathon Oil Co. v. Mobil Corp.*, No. C81 2193, slip op. at 3 (N.D. Ohio Nov. 30, 1981. App. 1534-35 (affidavit of G. Norman Nicholson, Vice President for Marketing – Marathon Oil Co)). Our prime concern is the preservation of some competition in this market, which a dismembering of Marathan could damage. Therefore, because of the likelihood, as found by the District Judge, of the finding of violation of antitrust laws being made after the hearing on the petition for a permanent injunction[1] the Mobil Corporation stands enjoined from purchasing shares of the Marathon Oil Company until and unless Mobil is freed from temporary injunctive relief after full trial at the District Court level, or unless the effectiveness of this order is stayed or overruled by the Supreme Court of the United States.

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[1] On this record, we believe that there is a strong probability of such a finding.

In the sentences underlined above, we specifically rejected Mobil's belated proposal of a "hold separate order" applicable to its oral suggestion of a Mobil-Amerada Hess contract for diverstiture by Mobil of certain of Marathon's assets. We now reiterate our prime concern is the preservation of some competition in this market which a dismembering of Marathon could damage. Nothing that Mobil has proposed in these belated filings would serve to protect the marketplace from the elimination, in times of shortage, of price competition provided by independent dealers previously supplied by Marathon. We are not convinced that Mobil's "hold separate" proposal which would cut Marathon's refining and marketing operations from its oil field production and reserves would cure the probable antitrust violations. It would leave Marathon's refining and marketing operations at the mercy of basic suppliers (like Mobil) and make it more vulnerable to possible monopoly pressures previously described in our opinion of December 23, 1981.

At the time of his original denial of Mobil's oral motion to modify the injunction, the trial judge had no formal proof of any arrangement which Mobil might have made with Amerada Hess. His refusal to reopen at that time was not an abuse of discretion. The trial judge's refusal to reopen later and after a formal agreement had reportedly been arranged likewise was not an abuse of discretion since there is no showing that such an agreement would cure the probable antitrust violation.

Under these circumstances, we reaffirm this Court's December 23, 1981, rejection of Mobil's proposed "hold separate order"; and we deny Mobil's Emergency Motion to Preserve the Status Quo Pending Certiorari filed in this court December 31, 1981.